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Privy Council Appeals.

CASES

HEARD AND DETERMINED BY

THE JUDICIAL COMMITTEE

AND THE

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY EDMUND F. MOORE, ESQ., M.A.,
ONE OF HER MAJESTY'S COUNSEL.

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ERRATA.

Page	*Line*	
420	9	from bottom, *for* "3 & 4 Will. 4, c. 92" *read* "2 & 3 Will. 4, c. 92."
437	2	from bottom, *for* "crossing the hause" *read* "crossing the course."
548	20	from bottom, *for* "the Mortgagee" *read* "the Mortgagor."

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Appeal Cases

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

THE BISHOP OF CAPE TOWN . . . . . APPELLANT; J. C.*

AND 1869

THE BISHOP OF NATAL . . . . . RESPONDENT. *July* 1, 5, 6.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Natal—Crown grant of land for Cathedral Church—Letters Patent appointing Bishops of Cape Town and Natal—Resignation of Bishop of Cape Town and re-appointment as Metropolitan, effect of—Action of Ejectment—Variation of decree—Appointment of new Trustee.

In 1847, the Colony of the *Cape of Good Hope*, with its dependencies, was erected into a Bishop's See and Diocese, to be called the "Bishopric of *Cape Town*," and the Appellant was appointed and consecrated Bishop thereof. By the Letters Patent the Bishop was constituted a body corporate, with power to hold and enjoy land and hereditaments of what nature or kind soever; and he was further empowered to resign the office of Bishop of *Cape Town*, without prejudice to any responsibility to which he might be liable, in law or equity, in respect of his conduct in his office. In 1850, a grant was made, in the name and on behalf of Her Majesty, of a piece of land in the Town of *Pietermaritzburg* and District of *Natal*, in the Colony, to the Appellant and his successors, in trust for the English Church. In

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* *Present*:—Sir William Erle, Sir James William Colvile, Sir Joseph Napier, Bart., and The Lord Justice Giffard.

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v.
THE BISHOP OF NATAL.

October, 1853, the Appellant, in pursuance of the power given him in his Letters Patent, resigned the office and dignity of Bishop of *Cape Town*. In November, 1853, Letters Patent were issued for erecting the District of *Natal* into a separate See or Diocese, subject and subordinate, with the See of *Graham's Town*, thereby also created a separate See, to the Metropolitan See of *Cape Town*; and the Respondent was appointed Bishop of *Natal*. The Respondent was, as in the original Letters Patent creating the Appellant Bishop of *Cape Town*, constituted a Corporation sole, with the like power to hold and enjoy lands, and the Church then building on the ground granted in 1850, was declared to be thenceforth the Cathedral Church and See of the Respondent as such Bishop of *Natal*. In December, 1853, the Appellant was appointed, by Letters Patent, Bishop of the See of *Cape Town*, and Metropolitan of the *Cape of Good Hope*, with the same corporate character and capacity as had been before conferred on him by the Letters Patent of 1847. Soon after the Respondent's consecration, the Appellant appointed him by power of Attorney to act as Trustee of certain lands and Churches in the Colony and See of *Natal*, including the land and Cathedral Church thereon in the City of *Pietermaritzburg*, granted in 1850, and which had then been entered on the Colonial register in the name of the Appellant. In 1864, the Appellant revoked this power of Attorney. In consequence of this and other proceedings taken at the instance of the Appellant to prevent the Respondent from having the free use of the Cathedral Church at *Pietermaritzburg*, the Respondent brought an action of ejectment against the Appellant for possession of the land and Church, claiming nominal damages, and for the substitution of his own for the Appellant's name as Trustee thereof. The Supreme Court gave judgment in favour of the Respondent, and decreed the land and the buildings thereon to stand vested in the Respondent and his successors, as Bishops of *Natal*.

On appeal, *Held*, by the Judicial Committee, first, that though the suit was not properly framed so as to allow the substitution of the Respondent as Trustee in the place of the Appellant, yet that, having regard to the terms of the grant, and the successive Letters Patent appointing the Appellant and Respondent respectively Bishops of *Cape Town* and *Natal*, and that the Respondent's Patent was subsequent to the Appellant's resignation, but prior to his second Patent as Metropolitan; the Appellant had ceased on such resignation to be a Trustee of the land and Cathedral Church, or to have any estate or right to interfere with the Respondent's free access to and use of such Church; and

Second, that it was competent to the Crown at the date of the Letters Patent to the Respondent, to "Ordain and declare that the Church in the City of *Pietermaritzburg* should thenceforth be the Cathedral Church and See of the Respondent and his successors, Bishops of *Natal*;" and the decree of the Court below varied by its being declared, that the Respondent, as Bishop of *Natal*, should have free and uninterrupted access to the land and premises in the grant of 1850, for the purpose of enjoying and exercising all rights, privileges, and immunities, which had hitherto been enjoyed and exercised, or ought to be enjoyed and exercised, by the Bishop of *Natal*, as such Bishop or otherwise, in reference to or within the Cathedral thereon, and its appurtenances; and that the Appellant, the Bishop of *Cape Town*, and his

Agents, be restrained from in any manner interfering with such access, enjoyment, or exercise; saving, however, to any, except the Appellant, any rights in reference to the Cathedral Church as they also enjoyed.

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THIS was a suit, in the nature of an action of ejectment, for possession of a piece of ground and building erected thereon, in the town of *Pietermaritzburg*, being the English Church of *St. Peter*, appropriated for the Cathedral of the Diocese of *Natal;* which ground and building had originally, and before the severance of the See of *Natal* from that of *Cape Town*, been granted to the Appellant, the then Bishop of *Cape Town*, for the use of the English Church of *Natal*.

The facts of the case were as follows:—

By Letters Patent under the Great Seal of the *United Kingdom*, dated the 25th of June, 1847, the Colony or Settlement of the *Cape of Good Hope* with its dependencies, and the Island of *St. Helena*, was erected into a Bishop's See and Diocese, called the "Bishopric of *Cape Town*," and by the same Letters Patent it was signified to the then Archbishop of *Canterbury*, that Her Majesty had appointed the Appellant to be the Bishop of such See and Diocese; who, having been duly consecrated, entered into and possessed and became the Bishop of that See.

The Appellant was by the Letters Patent granted to be a body corporate, and was constituted to be a perpetual corporation and to have perpetual succession; and upon him and his successors was conferred the title of Bishop of *Cape Town;* and the Appellant and his successors were, by the title aforesaid, empowered to hold and enjoy lands and hereditaments of what nature or kind whatsoever.

At the date of these Letters Patent the District of *Natal* was a dependency of the Colony of the *Cape of Good Hope*, and was within the See or Diocese created by such Letters Patent.

On the 19th of March, 1850, His Honour, *Edmund French Boys*, Administrator of the Government of the District of *Natal*, granted a piece of land situate in the District to the Appellant, by a Deed under the public seal of the District of *Pietermaritzburg*, which was as follows:—"In the name and on behalf of Her Majesty *Victoria*, by the Grace of God, &c., &c., I do hereby grant in freehold unto the Right Reverend *Robert*, Lord Bishop of *Cape Town*,

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and his successors of the See, in trust for the English Church at *Pietermaritzburg*, a certain piece of ground containing one acre, two roods, and thirty-two perches, situated in the Town of *Pietermaritzburg*, in the District of *Natal*, being that marked Number 17 in *Longmarket Street*, on the general plan of that Town, and bounded north-east by Lot 18, south-east by *Longmarket Street*, south-west by Lot 16, and north-west by *Church Street*, and with full power and authority henceforth to possess the same in perpetuity, subject however to all such duties and regulations as are either already or shall in future be established with regard to such lands."

The Appellant took possession of such land under the terms of this deed.

By the above Letters Patent of the 25th of June, 1847, it was declared, that if the Appellant or any of his successors should, by instrument under his hand and seal delivered and sent to the Archbishop of *Canterbury* for the time being, and by him accepted and registered in the Office of Faculties of the Archbishop, resign the Office and dignity of Bishop of *Cape Town*, such Bishop should, from the time of such acceptance and registration, cease to be Bishop of *Cape Town* to all intents and purposes, but without prejudice to any responsibility to which he might be liable, in law or equity, in respect of his conduct in his Office.

In October, 1853, the Appellant exercised the right of resignation, and resigned the Office and dignity of Bishop of *Cape Town*.

On the 23rd of November, 1853, Letters Patent were issued under the Great Seal for the purpose of erecting the District of *Natal* into a separate See or Diocese. These Letters Patent, after reciting, amongst other things, the resignation of the Appellant, and that the See or Diocese of *Cape Town* was vacant, that it was of inconvenient size, and that it was expedient that the same should be divided into three Bishoprics or Sees, to be styled the Bishoprics of *Cape Town*, *Graham's Town*, and *Natal*, the Bishops of such Sees of *Graham's Town* and *Natal*, and their successors, to be subject and subordinate to the See of *Cape Town* and the Bishop thereof and his successors, in the same manner as any Bishop of any See within the Province of *Canterbury* was under the authority of the Archiepiscopal See of that Province; appointed the Respondent to be ordained and consecrated Bishop of the separate See and Diocese

of *Natal*, and further ordered, that the Respondent should within six months after the date of the Letters Patent take an oath of due obedience to the Bishop of *Cape Town*, for the time being, as his Metropolitan. The Respondent and his successors were by such Letters Patent granted to be a body corporate, and he was constituted a perpetual corporation, and upon him and his successors was conferred the name or title of Bishop of *Natal*, and the City of *Pietermaritzburg*, within the Colony or settlement of the *Cape of Good Hope*, was ordained and constituted to be a Bishop's See and the seat of the Respondent; and the Church therein described as then in course of erection, but not as yet consecrated, to be the Cathedral Church of the Bishop. That Church, which was afterwards completed and consecrated, and has ever since been known as the Cathedral Church of *St. Peter*, in *Pietermaritzburg*, was erected on the piece of ground comprised in the before mentioned Crown grant of the 19th of March, 1850.

By Letters Patent under the Great Seal, dated the 8th of December, 1853, the Appellant was appointed Bishop of the See or Diocese therein particularly described, and ordered thenceforth to be called the Bishopric of *Cape Town*, and also Metropolitan Bishop in the Colony of the *Cape of Good Hope* and its dependencies, and the Island of *St. Helena*, and the appointment was signified to the then Archbishop of *Canterbury*. By these Letters Patent the Appellant was, as before, granted to be a body corporate, and he was constituted to be a perpetual corporation, and to have perpetual succession, and upon him and his successors was conferred the name and title of Lord Bishop of *Cape Town;* and they were thereby empowered under such name and title to hold and enjoy lands and hereditaments of what nature or kind whatsoever.

The Appellant entered into, and possessed, the Bishop's See as Bishop thereof, and to him, as Lord Bishop of *Cape Town* and Metropolitan, the Respondent took the oath of due obedience.

After the consecration of the Respondent as Bishop of *Natal*, he procured from the Appellant a power of Attorney to act for and represent the Appellant as Trustee of certain lands and Churches in the Colony and See of *Natal*, which lands and Churches were

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vested in the See of *Cape Town*, and were registered in the name of the Appellant, and the land particularly described in the deed of grant hereinbefore set forth, dated the 19th of March, 1850 (together with the Church erected thereon), formed the portion of the lands and Churches in respect of which the Appellant gave to the Respondent such power of Attorney to act for and to represent him as Trustee. This power was afterwards revoked by the Appellant.

On the 18th of April, 1864, the Appellant, as Metropolitan, pronounced a sentence and decree against the Respondent, purporting to depose him from his office of Bishop of *Natal*, and to prohibit him from the exercise of any divine office within any part of the metropolitical Province of *Cape Town*.

On the 31st of March, 1865, Her Majesty, by and with the advice of Her Privy Council, by an Order in Council, declared that such sentence, and the proceedings thereon, were null and void in law (1), and commanded all persons whom it might concern to take notice of such declaration, and govern themselves accordingly. On the 31st of May, 1865, the Rev. the Dean and Incumbent of the Cathedral Church, acting at the instance of the Appellant, who, as well as himself, had notice of the above Order in Council, assisted in publishing a declaration, previously signed by the Dean, that it was his fixed resolve no longer to acknowledge the Respondent as his Bishop.

In the month of November, 1865, the Dean and Incumbent of the Cathedral Church, acting in concert with the Churchwardens, and, as it was alleged, at the instance of the Appellant, and as his Agents, commenced a course of pertinacious and forcible obstruction to the use of the Cathedral by the Respondent and the Members of the English Church at *Pietermaritzburg* generally; and the Respondent was thereby driven to take legal proceedings in the Supreme Court of the Colony of *Natal* against the Dean and Churchwardens, and obtained Orders and Interdicts against the continuance of such interruption. In these proceedings several Orders and Interdicts were made on the application of the Respondent against the Defendants thereto.

(1) *In re The Lord Bishop of Natal*, 3 Moore's P. C. Cases (N.S.) pp. 115, 157.

The Respondent commenced the present action by filing a declaration against the Appellant in the Supreme Court of the Colony of *Natal* on the 10th of September, 1866, and thereby, after stating the facts relating to the title to the piece of ground at *Pietermaritzburg*, and that the Appellant had by force and violence continued to keep partial and adverse possession of such ground and the Cathedral Church erected thereon, whereby the Respondent had suffered one farthing damage, prayed that the Appellant might be ejected from all or any possession he might have therein, and that the grant might be reduced, altered, or amended, by substituting the name of the Respondent and his successors in Office as Trustees thereof.

The Appellant pleaded the general issue, and the Respondent replied generally.

The cause was argued before the Chief Justice, and the Justices *Connor* and *Phillips;* and on the 31st of January, 1867, the majority of the Court, consisting of the Chief Justice and Mr. Justice *Phillips*, gave judgment for the Respondent with one farthing damages, and decreed the land in question and the buildings thereon to stand vested at law in the Respondent in his corporate capacity as Bishop of *Natal*, and his successors in office; with costs. Mr. Justice *Connor* dissented.

The appeal was from this judgment.

Sir *R. Palmer*, Q.C., and Mr. *Arthur Charles*, for the Appellant:—

The question in this case is one of title to real estate. The suit was in the nature of an action of ejectment, and the decree giving possession to the Respondent, the Plaintiff in the Court below, and his successors in Office, as Bishops of *Natal*, is, as we maintain, erroneous, and contrary to law. At the date of the grant of the land, the 19th of March, 1850, the District of *Natal* was a dependency of the Colony of the *Cape of Good Hope*, and had been so when the Colony was erected into a Bishopric by the Letters Patent of the 25th of June, 1847. The Respondent, therefore, was not entitled to have the land and buildings vested in him and his successors. The grant is in express terms to the Appellant and his successors, and the trust declared is for the English Church at *Pietermaritzburg*. Now, what has happened since

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that grant to alter the nature of the tenure, or change the trusteeship of the land? It is not contended that there is any alteration in the trust. The English Church is the object of the trust; the land and Church built thereon are for the benefit of that Church, and for no other purpose. What, then, has happened to change the trusteeship? In pursuance of a power given by the original Letters Patent creating the Bishopric of *Cape Town*, the Appellant resigned that See in October, 1853, and was re-appointed as Metropolitan and Bishop of *Cape Town* in December of the same year. It is true, that the Bishopric of *Natal*, with that of *Graham's Town*, had been in the interval taken out of the Bishopric of *Cape Town*. Two Suffragan Bishops being thus appointed, this was a subdivision of the Diocese of *Cape Town* for which no provision had been made in the original Letters Patent constituting that See and creating it a perpetual corporation. But as regarded the land in question, that was ineffectual to change the ownership, which could only be done by an Act of the Legislature, as in the like case of *New Zealand*, 15 & 16 Vict. c. 88. The Crown by its prerogative can create a corporation, but it cannot by its prerogative dissolve it. The King may grant privileges and immunities, but when they are once vested he cannot by his mere prerogative take them away. *Kyd* on Corporations, Vol. ii. p. 447; *Reg.* v. *Eton College* (1). Stress has been laid on the decision of this Court in *Long* v. *The Bishop of Cape Town* (2). That case, however, went only to declare the constitution and Ecclesiastical authority of the Bishop of *Cape Town* over Mr. *Long*, a Minister in his Diocese, for an alleged offence which was not an Ecclesiastical offence. *Dr. Warren's Case*, in *Grindrod's* Compendium of the Laws and Regulations of Wesleyan Methodism, p. 371 [8th Ed.]. In the case of *The Lord Bishop of Natal* (3) the Ecclesiastical *status* and authority of both the Appellant as Metropolitan Bishop of *Cape Town*, and the Respondent as a Suffragan Bishop, was fully discussed and considered, but nothing in that case militates against the right of the Appellant, in his character as Bishop of *Cape Town*, to hold lands granted to him and his successors in trust when he was first appointed Bishop—though he was afterwards appointed, with

(1) 8 E. & B. 610. (2) 1 Moore's P. C. Cases (N.S.) 411.
(3) 3 Moore's P. C. Cases (N.S.) 115.

the same title, Metropolitan, his Ecclesiastical jurisdiction being increased, though his territorial was diminished, by the appointment of two Suffragan and subordinate Bishops. What we insist on is: that neither the land comprised in the deed of the 19th of March, 1850, nor the building erected on it since, has been divested or taken away from the Appellant, who is the legal owner, whether as the original Grantee by name, as well as designation, or as successor to such original Grantee, in the office of Bishop of *Cape Town*. In either character he is Trustee under the grant, and ought to have been so declared by the judgment of the Court below. The Respondent recognised and acquiesced in the Appellant's title to this land by consenting to hold the same under a power of Attorney from the Appellant; how then can he now be heard to say that the land is not, and never has been since his appointment as Bishop of *Natal*, vested in the Bishop of *Cape Town?*

Mr. *Wickens*, and Mr. *Westlake*, for the Respondent:—

The Crown grant of the 19th of March, 1850, though nominally made to a certain corporation sole, now extinct, namely the Bishop of the then See of *Cape Town*, and his successors, must be read according to the true meaning thereof. That is, that the piece of ground thereby granted should be held in trust by the Bishop of the Diocese for the time being. The Respondent, therefore, and his successors in the See of *Natal*, became, in and from the 8th of December, 1853, the successors in office of the Appellant within the true intent and meaning of the deed of grant. The learned Chief Justice in the Court below in his judgment asks, "how in a legal sense is this deed of grant to be construed? The law, both English and Roman-Dutch, says, deeds shall be so construed as to operate according to the intention of the parties, if by law they may, and if they cannot in one form, they shall operate in that which by law will effectuate the intention. The rules which govern the construction of grants have been settled with the greatest wisdom and accuracy; such effect is to be given to the instrument as will effectuate the intentions of the parties;" and he states, that in his opinion, it never was the intention of the parties to the deed in question to vest the land in the Appellant in any other way than in

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his corporate capacity as Bishop of *Cape Town*, and, as such, the then head of the English Church in *Natal;* but that *Natal* being now a separate and distinct See, the Bishop of *Natal* occupies as regards the land the same relative position that the Bishop of *Cape Town* did before the See of *Natal* was created. The land, it must be remembered, is given for public purposes, not for an individual interest, there is, therefore, no analogy between the trusts created by this grant and such as are continually created and subsist between Trustee and *cestui que trust*. According to the Civil law the grant of the land was for a pious use, and, though given to an individual, is, at the utmost, to be held by him only so long as he is capable of administering it for its original purpose. If the Roman-Dutch law applies it is governed by the Civil law. The doctrine of the Roman law regarding pious uses is fully treated on by *Mühlenbruch, Doctrina Pandectarum, Lib.* I., *De personis,* Cap. III., § 201; *tit.* "*Pia Corpora,*" Vol. i., p. 397 [Ed. 1838]. The grant of the land, in the circumstances that have happened, created a trust in the Crown for the benefit of the Church of *Natal*, which has become vested in the Respondent as Bishop of that Diocese. In no case, therefore, whether the trust was a vacant trust at the time of the appointment of the Respondent, or whether the Respondent is the successor of the Appellant in the true sense and meaning of the grant, can his right to the trusts of this land be disputed, and the judgment of the Court below was the only proper decision that could be given. The Respondent did not and could not waive his claim, whenever he chose to assert it, on behalf either of himself or his successors. In the case of *The Bishop of Natal* v. *Gladstone* (1) the Master of the Rolls held, that the Bishop of *Natal* had a legal *status* as Bishop in the Colony, notwithstanding the judgment of this Tribunal in *In re the Lord Bishop of Natal* (2), which decided, that neither the Appellant nor his Metropolitan had any coercive jurisdiction. There can be no doubt, that the Bishops both of *Natal* and *Graham's Town* were considered in the Colony capable of succeeding to, and holding, lands in their respective Dioceses, for the Colonial Act of the 17th of July, 1860, was passed for the very purpose of enabling them, by exchange and otherwise, to deal with lands so possessed by them.

(1) Law Rep. 3 Eq. 1.

(2) 3 Moore's P. C. Cases (N.S.) 115.

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Their Lordships reserved judgment, which was now delivered by

THE LORD JUSTICE GIFFARD :—

The appeal in this case is from a judgment or Order of the Supreme Court of the Colony of *Natal*. That judgment or Order, after setting forth certain proceedings in which the Right Reverend *John William Colenso*, in his capacity as Lord Bishop of *Natal*, was Plaintiff, and the Right Reverend *Robert Gray*, of *Cape Town*, in his capacity as the Lord Bishop of the Diocese of *Cape Town*, was Defendant, and shewing that these proceedings referred to land, buildings, and premises comprised in a grant from the Crown, dated the 19th of March, 1850, gave judgment for the Plaintiff for one farthing damage, and did "decree that the land in question, and the buildings thereon, at law do now stand vested in the Plaintiff, in his corporate capacity, and his successors in office, as Bishops of *Natal;* with costs."

The grant was in the name and on behalf of Her Majesty, and purported to grant "in freehold, unto the Right Reverend Father in God, *Robert* Lord Bishop of *Cape Town*, and his successors of the said See, in trust for the English Church at *Pietermaritzburg*, a certain piece of ground, containing 1a. 2r. 32p., situated in the Town of *Pietermaritzburg*, in the District of *Natal*, and with full power and authority henceforth to possess the same in perpetuity; subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands."

The Plaintiff's declaration, on which the judgment or Order proceeds, after referring to the grant of the 19th of March, 1850, was as follows: "And Plaintiff saith, that thereafter the Defendant, in his capacity as such Lord Bishop of *Cape Town*, caused the said plot of ground to be taken possession of for the use of the English Church in *Natal*, in terms of said deed, and occupied same, and so continued in possession until on or about the month of October, 1853, when the Defendant resigned his said See of *Cape Town*, which was by Her Most Gracious Majesty dissolved, and thereout various Sees or Dioceses created, namely, the See or Diocese of *Cape Town*, the See or Diocese of *Graham's Town*, and the See or Diocese of this Colony of *Natal*. And Plaintiff saith, that

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the newly created See of *Cape Town* to which the Defendant was appointed Bishop, was totally distinct from the former See of *Cape Town*, and entirely excluded the Colony of *Natal*, or any part thereof, and from the date of such resignation the said Defendant ceased to have any right to hold the said property under the said trust. And the said Plaintiff further saith, that by Letters Patent of Her Majesty, dated the 23rd day of November, 1853, this Colony was created into an independent and separate Bishopric, to which Plaintiff was appointed Bishop, and so became the successor in office of Defendant with reference to said trust, as far as relates to this Colony of *Natal*. And Plaintiff lastly saith, that Defendant by force and violence continued to keep partial and adverse possession of said plot of ground aforesaid, and the buildings and premises erected thereon, to wit, the Cathedral Church known as *St. Peter's*, to the great damage of Plaintiff, and against the peace of Our Sovereign Lady the Queen, wherefore he saith he hath suffered damage to the value of one farthing, and brings this suit, praying the judgment of this Honourable Court that the Defendant be ejected from all or any possession he may have of the said plot of ground, or the said buildings erected thereon as aforesaid. And that the said deed of grant be reduced, or altered, or amended, by substituting Plaintiff's name and his successors in office in said deed, as the holders or trustees of said property for said purposes in the Colony of *Natal*, and with full costs of suit."

Issue was joined, the Defendant putting the Plaintiff to proof of his case, and insisting, that the whole suit ought to be dismissed with costs. Evidence was entered into on both sides, that of the Defendant being documentary, and consisting, amongst other things, of Letters Patent, dated the 25th of June, 1847, on which he relied; that of the Plaintiff consisting both of documentary and oral evidence. There is proof as between the Plaintiff and Defendant of the Plaintiff's title, and there is also proof that he was excluded from *St. Peter's Church*, as well as obstructed in having access thereto, and in taking part in and performing the accustomed religious services there as Bishop. From the whole result of the evidence, documentary and oral, their Lordships can come to no other conclusion than that the Defendant was the cause of and authorized this exclusion and obstruction; and regard being

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had to the Letters Patent put in on his behalf, and to the course pursued by him, he must be taken to have done so under a supposed title, alleging that the Plaintiff has no right of any description, and that he, the Defendant, had, and has, an estate in the land, and was, and is, trustee under the grant.

Under these circumstances, the first matter to be considered is, as to the form and scope of the proceedings in the suit; and as to these, while on the one hand they are not so framed, especially in point of parties, as to have enabled the Supreme Court to alter or rectify the grant, or to remove the Defendant from being a Trustee, if he be one, or to appoint the Plaintiff a Trustee; yet, on the other, their Lordships are of opinion, that the Plaintiff is entitled, as between him and the Defendant, to a judgment to some extent in his favour, provided he has, as against the Defendant, a right, either legal or equitable, to use, or have access to, the Church in question. In order to determine whether he has or has not any such right, their Lordships think it unnecessary to follow in detail the very able and elaborate arguments which have been directed more or less to the various questions arising, or supposed to arise, on the three cases of *Long* v. *The Bishop of Cape Town* (1); of *The Bishop of Natal* (2); and of *The Bishop of Natal* v. *Gladstone* (3). Their Lordships think it sufficient for them to say, that the following propositions are not at variance with any conclusions which have been arrived at in any one of those cases, have scarcely been disputed, and cannot be successfully controverted: viz., that the Letters Patent were not wholly void; that there was, by virtue of the Letters Patent of 1847, a corporation capable of taking as such under the grant; that there was a valid resignation by the Defendant of the office held under the Letters Patent of 1847; and that by the two Letters Patent of 1853, of which the Plaintiff's was the earlier, there was a creation of two new corporations, both capable of taking under a grant from the Crown, but neither coming within the terms of the grant of 1850, and, consequently, not taking an estate under it. The Defendant's second Patent, if the terms at the end of it be looked to, plainly creates a new corporation. A corporation, to be capable of taking an estate under the

(1) 1 Moore's P. C. Cases (N.S.) 411. (2) 3 Moore's P. C. Cases (N.S.) 115. (3) Law Rep. 3 Eq. 1.

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grant alone, must be the corporation described in it, and have existed at its date. Having regard to these propositions, and to the terms of the grant of 1850, be it remembered, a grant from the Crown, "subject to all such duties and regulations as are or shall be established with regard to such lands;" having regard also to the fact of *Natal* being separate from the *Cape*, to the circumstances and state of the Colony of *Natal*, and the inception of the Church there, we consider that it was competent for the Crown, in the words of the *Natal* Patent of 1853, to "ordain and declare that the Church (now in course of erection, and not yet consecrated or dedicated) in the said City of *Pietermaritzburg* shall henceforth be the Cathedral Church and See of the said *John William Colenso*, and his successors, Bishops of *Natal*;" and this being so, that the effect of the grant and the Plaintiff's Letters Patent of 1853 was at least to give the Plaintiff the right of access to the Church, the right to officiate there as Bishop, and the right to perform there all the religious services which are or ought to be performed by a Bishop in a Cathedral consistently with the laws and usages of the Church of *England*, so far as the same are applicable to the Church and Colony in question.

There can be no doubt but that the Plaintiff exercised all these rights, and had possession and occupation and access for these purposes from the date of his appointment in 1853 until the end of 1863; a period of ten years. There was during this time no title but under the grant of 1850, and the Plaintiff's Letters Patent of 1853.

Their Lordships, founding their judgment on all these considerations, and having regard also to the former decision of this Committee in the matter of *The Bishop of Natal*, do not hesitate to state with respect to the Defendant, the Appellant here, that he had, and has, no estate or title as Trustee or otherwise, and no right to interfere; and with respect to the Plaintiff, the Respondent, that he has the rights expressed by that which is, in their opinion, the Order which ought to have been made by the Supreme Court of *Natal*. That Order their Lordships will humbly advise Her Majesty to substitute for so much of the existing Order as begins with the word "Decree," and it is as follows:—

Decree—"That the Plaintiff, the Bishop of *Natal*, do have free

and uninterrupted access to the land and premises in the grant of the 19th of March, 1850, mentioned, for the purpose of enjoying and exercising all rights, privileges, and immunities which have hitherto been enjoyed and exercised, or ought to be enjoyed or exercised, by the Bishop of *Natal* as such Bishop or otherwise, in reference to or within the Cathedral thereon and its appurtenances, and that the Defendant, the Bishop of *Cape Town* and his Agents, do abstain from in any manner interfering with such access, enjoyment, or exercise; saving, however, to any, except the Defendant, any rights in reference to the Cathedral as they also enjoyed." Their Lordships recommend an Order thus qualified, because their Lordships' decision relates only to the questions in dispute between the Respondent and the Appellant.

Their Lordships, in coming to the conclusion at which they have arrived, have not failed to take into consideration the power of Attorney which was revoked by the Appellant's deed of the 13th of April, 1864, and that part of the Appellant's Letters Patent of 1853 which is in these terms:—"We are, moreover, pleased to order and direct that the said Bishop of *Cape Town*, under that title, may take up, continue, and proceed with every act or engagement lawfully commenced, done, or entered into as Bishop of *Cape Town*, under the Letters Patent heretofore granted to him as Bishop of the said See of *Cape Town*."

The Respondent's rights depend on the deed of grant of 1850, and his Letters Patent of the 8th of December, 1853. That Patent was subsequent to the Appellant's resignation, but preceded the Appellant's Patent of the same year. The fact that the Appellant gave, and that the Respondent accepted, a power of Attorney, may be evidence of what they at one time may both have supposed their relative rights and positions to be; but the power of Attorney could not call rights or interests into existence which did not otherwise exist, nor does its revocation preclude the Respondent from asserting the continuance or existence of the rights conferred on him by the Crown. It has already been determined, that the Bishop of *Cape Town* has no jurisdiction, coercive or consensual, over the Bishop of *Natal;* the words contained in the Bishop of *Cape Town's* Letters Patent are plainly insufficient to give him any estate in the land and premises in question, or to continue any estate in him. He

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ceased to be Trustee when he resigned. He then ceased to have any interest, legal or otherwise, under the grant. Without an estate there could not be, and, in our opinion, there was not intended to be, any continuance in him of the trust created by the grant. Even if the estate had remained vested in the Appellant, and he had continued a Trustee, he, as Trustee, would have no right to obstruct or exclude the Respondent, as has been done. The conclusions at which their Lordships have arrived would be the same whether considered with reference to English Law and Equity, or Roman-Dutch Law.

It is manifest from what we have stated, that we differ from the Supreme Court, so far, at all events, as the Appellant is concerned, in form more than in substance. The judgment of the Supreme Court purported to deal with the actual estate in the land, Church, and premises, and, as we conceive, with the trust. This, in our opinion, could not be properly done in a suit constituted as the present suit is; therefore, we have recommended the substitution of the Order which has been read for that which was originally made by the Supreme Court. So far the appeal has been successful; but as we are of opinion, that the Appellant has no estate, and was wholly wrong in the course he thought fit to take, we shall humbly advise Her Majesty to the effect, that no costs of the appeal be given, and that that part of the judgment in the Supreme Court which gave the Respondent his costs there, be not disturbed. As between the Respondent and the Appellant, the Respondent was substantially right, and the fact that he asked for more than he was entitled to, led to no additional issues or evidence.

Their Lordships will humbly advise Her Majesty in conformity with this judgment.

Proctors and Solicitors for the Appellant: *Brooks & Du Bois.*
Solicitors for the Respondent: *Shaen & Roscoe.*

WILLIAM HASTINGS RYLAND . . . . APPELLANT;

AND

ALEXANDER MAURICE DELISLE . . . RESPONDENT.

J. C.*
1869
July 6.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Lower Canada Civil Code, tit. "Obligations," sect. V., Nos. 1,187-8—*Construction—Compensation—Debtor and Creditor—Set-off—Extinguishment of mutual debts.*

The *Canadian Act*, 14 & 15 Vict. c. 51, consolidating and regulating the general clauses relating to Railways, enacts by sect. 19, cl. 1, that "each Shareholder shall be individually liable to the Creditors of the Company, to an amount equal to the amount unpaid on the Stock held by him, for the debts and liabilities thereof, and until the whole amount of his Stock shall have been paid up; but shall not be liable to an action therefor before an execution against the Company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such Shareholders."

Article 1,187 of the Civil Code of *Lower Canada*, tit. "Obligations," sect. V., provides, that "when two persons are mutually Debtor and Creditor of each other, both debts are extinguished by compensation which takes place between them," and Article 1,188 declares, that "compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality."

A., a holder of Stock in a Railway Company in *Lower Canada*, of which Company he was President at a specified salary, paid up his shares to a certain amount, and as far as calls were made by the Company. *B.*, a judgment Creditor of the Company, sued *A.*, under the Act, 14 & 15 Vict. c. 51, in his character of a Shareholder of the Company, for the amount of his Stock unpaid. *A.* pleaded in defence, compensation under the 1,187th and 1,188th Articles of the above Code, the Company being indebted to him for salary as President to an amount exceeding the sum due on the unpaid Stock, which he insisted operated as an extinguishment by compensation. The Court of Queen's Bench in *Lower Canada* were of opinion, that compensation had taken place under the above Articles of the Civil Code. Upon appeal:—*Held* by the Judicial Committee (reversing such judgment), that, as no calls in respect of the unpaid Stock held by *A.* had been made, as provided by sect. 16, cl. 10, of the above Act, the provisions of Articles

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., and THE LORD JUSTICE GIFFARD.

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1,187 and 1,188 of the Civil Code did not apply, and that compensation had not taken place between *A.* as a Shareholder and *B.*, as judgment Creditor of the Company.

THE Respondent was a Shareholder to the extent of forty shares of £25 each in the *Montreal and Bytown Railway Company*, incorporated by the Provincial Act of *Lower Canada*, 14 & 15 Vict. c. 51. He was also President of the Company; the sum of £1,000 having been voted him for his services for the year 1854, and credit given him for that sum in the Books of the Company.

On the 30th of April, 1856, one *Doutre* recovered judgment in an action against the Company for the sum of £612. 10*s.*, with interest, from the 13th of September, 1854, and costs.

The Company having failed to satisfy the judgment, *Doutre* issued out a writ of execution against the goods, chattels, lands, and tenements of the Company, which execution was afterwards returned by the Sheriff unsatisfied, either in the whole or in part.

Doutre, by deed of transfer, ceded and transferred to the Appellant, for valuable consideration, all his rights and interest in the judgment, the principal money, interest, and costs, which amounted, at the date of the deed of transfer, to £638. 4*s.* 7*d.*

The Appellant then brought an action in the Superior Court of *Montreal* against the Respondent, as a Shareholder in the Company, to recover that sum.

The action was founded on sect. 80, ch. 66, of the Consolidated Statutes of *Canada*, which, in the language of the previous Act, 14 & 15 Vict. c. 51, s. 19, cl. 1, enacts, that "each Shareholder shall be individually liable to the Creditors of the Company to an amount equal to the amount unpaid on the Stock held by him, for the debts and liabilities thereof; and until the whole amount of his Stock shall have been paid up; but shall not be liable to an action therefor before an execution against the Company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount returnable with costs against such Shareholders" (1). The declaration alleged, that the Respondent was personally liable to the Appellant, as a Creditor of the Company, for the debt so due by the Company to him, to an

(1) Consolidated Statutes of *Canada*, p. 775.

amount equal to the amount unpaid on the Stock so held by him, namely, £900.

The Respondent, in bar to the action, put in a plea of compensation, and alleged, that the sum credited to him in the Books of the Company for his salary, as President of the Company, operated in law as an extinguishment by compensation of any amount which he might have owed the Company upon any shares of Stock subscribed for by him and unpaid, and also the general issue, or *défense au fond en fait.*

The Superior Court of *Montreal* (Assistant Justice *Monk*), on the 31st of March, 1866, gave judgment in favour of the Appellant, condemning the Respondent to pay £638. 4*s.* 7*d.* currency, with interest on the sum of £612. 10*s.* from the 13th of September, 1854, with costs.

The Respondent appealed from this judgment to the Court of Queen's Bench of *Lower Canada;* and on the 5th of March, 1868, Mr. Justice *Caron* delivered the judgment of the majority of the Court of Queen's Bench (Mr. Justice *Loranger* dissenting), reversing the judgment of the Superior Court of *Montreal;* the Court of Queen's Bench being satisfied, upon the evidence, that the sum for salary was duly voted and credited to the Respondent as President of the Company, and that as the Company was solvent at the time such sum was credited to him, they were of opinion, that, under the 1,188th Article of the Code of *Lower Canada,* compensation had taken place by the operation of law between such sum and the balance due by him to the Company upon Stock unpaid for.

The appeal was from this judgment.

Mr. *J. Brown,* Q.C., and the Hon. *A. Thesiger,* for the Appellant:—

The question at issue, and on which the judgment of the Court of Queen's Bench is founded, is whether the amount due from the Respondent on account of his shares in the *Montreal Railway Company,* was compensated by the amount due to him from the Company, for his salary as President, at the time of the insolvency of the Company. The question depends upon the construction of the compensation Articles, 1,187 and 1,188, of the Civil Code of *Lower Canada.* Those Articles provide, where two persons are

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mutually Debtor and Creditor, for the extinguishment of the debt by compensation. The action is founded on section 80, ch. 66, of the Consolidated Statutes of *Canada*, which re-enacted the Colonial Act, 14 & 15 Vict. c. 51, s. 19, cl. 1, constituting the liabilities of Railway Companies. The fallacy of the judgment of the Court of Queen's Bench is, that it proceeds upon the assumption, that the Colonial Act only transfers to the Creditor of a Company the rights of the Company against its Shareholders; inferring, therefore, that the Creditor could only sue the Shareholder when and so far as he might have been sued by the Company; whereas the Act gives a personal, individual, and original right to the Creditor as against the individual Shareholder; a right which is to continue until the whole of his Stock is paid up; and which may be exercised at a time when the Stock may not have been called up by the Company, and when, consequently, no right to sue could exist in the Company. As the Act makes the Shareholder personally and originally liable to the Creditors of the Company, it follows, that that liability can only be discharged either by the ordinary modes of acquittance between a Debtor and Creditor, or by the mode prescribed by the Act, namely, paying up the whole amount of his Stock; and, consequently, that compensation or set-off between the Shareholder and the Company, which is *quoad* the Creditor's rights, merely a third party, cannot affect those rights. It is equally opposed to the principles of the Civil Code of *Lower Canada*, which expressly declares, by Art. 1,196, that "compensation does not take place to the prejudice of rights acquired by third parties." The requisites of compensation, as declared by that Code, do not exist in this case, inasmuch as the Company had not called up the amount remaining unpaid upon the shares of the Respondent; the Company consequently never was, in respect to such amount, a Creditor of the Respondent, nor had such amount ever become a debt, within the meaning of Art. 1,187 of the Code. Assuming, that the Company and the Respondent were, in respect of such amount, and the salary alleged to be due to the Respondent, in the language of the 1,187th Article, "mutually Debtor and Creditor of each other," and that such amount and salary had become "debts" within the meaning of that Article, yet the debts were not debts "equally liquidated and demandable," within the meaning of

Article 1,188, nor did they ever exist simultaneously, for while on one hand the Respondent had an immediate title to the payment of his salary, the Company, on the other hand, could not sue him for the amount unpaid on his Stock until a call had been made upon him, as provided by the Colonial Act, 14 & 15 Vict. c. 51, sect. 16, cl. 10, and the special Act of the Company. The same principle, that a debt is incapable of compensation, regulates the French Law, and illustrates the *Lower Canada* Code: *Pothier, Traité des Obligations, Tom.* I., Part 3, sec. 4, *tit.* Compensation or Set-off; *Toullier, Droit Civil, Tom.* VII., *Lib.* III., chap. V., sec. IV. So, by analogy, the English Law. As President he was not entitled to set off his salary as against his liability for calls: *The York and North Midland Railway Company* v. *Hudson* (1). Even if the Respondent had been a certificated Bankrupt, he would still be liable for future calls as a Shareholder: *The South Staffordshire Railway Company* v. *Burnside* (2); *The General Discount Company* v. *Stokes* (3); *Hopkins* v. *Thomas* (4).

Mr. *Mellish*, Q.C., and Mr. *W. W. Kerr*, for the Respondent:—

The question is reduced to this narrow point, whether the amount due by the Respondent for balance unpaid on the Stock subscribed for by him, was compensated by the amount due by the Company to him in March, 1854, for his salary as President of the Company up to that date. Our contention is, as decided by the Court below, that compensation had taken place by operation of law, as laid down in Articles 1,187 and 1,188 of the *Lower Canada* Code, such compensation being the balance due by the Respondent to the Company upon Stock unpaid for by him, and the sum of money which had been credited to him for his services as President to the Company, and that, not only before the recovery of judgment in the action by *Doutre* against the Company, but even before the debt, which is the basis of the action, had been contracted. A judgment Creditor of the Company suing an individual holder of unpaid Stock in the Company, for a debt due by the Company, cannot stand in a better position than the Company itself could, if suing the Shareholder, if no call was made.

(1) 16 Beav. 485.
(2) 5 Ex. 129.
(3) 34 L. J. (N. S.) C. P. 25.
(4) 7 C. B. (N. S.) 711.

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Their Lordships, without calling for a reply, delivered judgment by

THE LORD JUSTICE GIFFARD:—

The appeal in this case is from a judgment of the Court of Queen's Bench in *Lower Canada*, reversing a judgment of the Superior Court of the District of *Montreal*, with costs.

The judgment in the *Montreal* Court, which was delivered on the 31st of March, 1866, found the Respondent to be Debtor to the *Montreal and Bytown Railway Company* in £900 on the stock held by him, and approved the Appellant's claim as a judgment Creditor of the Company, having execution against the Company unsatisfied, and condemned the Respondent accordingly, as sued for by the Appellant.

The action in which that judgment was given was an action brought by the Appellant as a judgment Creditor of the Company against the Respondent, a Shareholder, as a Defendant, and in that action it was proved that there had been a return by the Sheriff of *nulla bona* to an execution against the Company. The action was founded on section 19 of the *Canadian Railway Clauses Consolidation Act*, the 14 & 15 Vict. c. 51. The first clause of which section is re-enacted by the Consolidated Statutes of *Canada*, ch. 66, sec. 80, tit. "Shareholders." By that section and paragraph it is enacted, that "Each Shareholder shall be individually liable to the Creditors of the Company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up; but shall not be liable to an action therefor before an execution against the Company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against such Shareholders."

The Defendant relied upon the Articles relating to compensation in the Code Civil of Procedure of *Lower Canada*, and the case made by him was, that there was due to him from the Company, for salary, a sum very far exceeding anything that he was or could be made liable to the Company for in respect of calls, that the sum due to him from the Company, in point of fact, extinguished

his liability to the Company, and that inasmuch as the Company never could have maintained proceedings against him in respect of any calls that they might make, the judgment Creditor was in no better position than the Company. We assume that no calls beyond calls for a sum of £100 had been made on the part of the Company; if any such calls had been made, it was the business of the Defendant both to have alleged and proved that they had been made; there is neither allegation nor proof to this effect; the Courts below proceeded on the assumption, that no calls beyond £100 had been made; and there can be no doubt but that they were right upon the pleadings and facts before them in making that assumption.

What, then, are the provisions of the Code which were relied on? They were these:—Article 1,187 provides, that "When two persons are mutually Debtor and Creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared." Article 1,188 declares, that "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money, or a certain quantity of indeterminate things, of the same kind and quality. So soon as the debts exist simultaneously they are mutually extinguished, in so far as their respective amounts correspond."

As calls had not been made, there could have been no compensation as between this Shareholder and the Company at the time of the action being brought by the Creditor, for when we refer to the 14 & 15 Vict. c. 51, s. 16, cl. 10, we see, that before any action could have been maintained by the Company as against the Shareholder, there must have been calls made by the Directors, and thirty days must have elapsed from the date of the calls. Moreover, at the time when the Appellant brought his action as Creditor, the Respondent, if he had any claim at all, had a right to proceed against the Company and recover payment from the Company of the £1,000, or whatever sum was due to him as President, and the Company could not have set up as against that action any counter-claim which they might have had in respect of his being a Shareholder; it follows, therefore, that the amount payable on the Stock held by the Defendant was not actually paid, discharged, and extinguished,

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and that the above Articles in the *Lower Canada* Code which have been relied on, do not apply to a state of circumstances in which, although there was a claim by the Defendant against the Company, there was no counter-right on the part of the Company, and no compensation as between him and them, and consequently no extinguishment of the debt. The Creditor under the Act is in a different position to that of the Company, and can recover only so long as any thing remains unpaid on the Stock held by the Shareholder.

This being so, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench of *Lower Canada* should be reversed.

The result, therefore, will be to restore the judgment of the Superior Court in *Montreal;* and their Lordships are of opinion, that the Appellant should have the costs in both the Courts below, and also on this appeal.

Solicitors for the Appellant: *Mackenzie, Trinder, & Co.*
Solicitors for the Respondent: *Roberts & Simpson.*

J. C.* 1869 *July 7.*

THOMAS CHERRY AND JOHN M'DOUGALL . APPELLANTS;

AND

THE COLONIAL BANK OF AUSTRALASIA . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Joint Stock Company—Principal and Agent—Authority given to Agent to draw on Bankers—Implied warranty—Personal liability of Directors.

Two of the Directors of a Joint Stock Company, by a letter to the Company's Bankers, notified that their Manager had authority to draw cheques on account of the Company. Such two Directors did not form a majority of the Directors of the Company, as required by their Act of incorporation, so as to bind the Company. Although the Company's account was at the time time overdrawn, and that fact was known to the two Directors, the Bankers honoured the Manager's cheques on the authority so given to them. In an action brought by the Bank against the two Directors for advances made on account of the Company upon the faith of their letter, the Court below *held,*

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., and THE LORD JUSTICE GIFFARD.

that there was an implied warranty on their part, and that they were personally liable to the Bank, and judgment was given to the extent of the sums overdrawn by the Manager subsequent to the date of their letter. Such judgment sustained on appeal.

THE Appellants were two of the Directors of the *Loch Fyne Quartz Mining Company* (a Company registered under the Colonial Act, 27 Vict. No. 228, the "*Mining Companies Limited Liabilities Act*, 1864"), engaged in mining for gold at the *Loch Fyne Quartz Claim*, near to *Matlock*, in the *Wood's Point* District. The Respondents were Bankers carrying on business at *Melbourne*, and had branch Banks at *Matlock* and *Wood's Point*, in the Colony of *Victoria*.

The action was brought by the Respondents against the Appellants to recover the sum of £4,127. 18*s*. 5*d*., being the amount paid by the Bank on cheques drawn by *Clarke*, the Manager of the Appellants' Company. The declaration stated, that in consideration that the Plaintiffs, at the request of the Defendants, would honour and pay, on account of the Company, the cheques of *Clarke*, the Defendants promised that he was duly authorized by the Company to make cheques for them as their Agent, and the Plaintiffs alleged that, relying on such promise, they did honour such cheques on account of the Company, but that *Clarke* was not authorized by the Company to make the same, by reason whereof the Plaintiffs lost the amount advanced by them. There were also money counts.

The Defendants pleaded to the special count:—First, that they did not promise. Second, that the cheques were not honoured on account of the Company. Third, that *Clarke* did not make any cheques on account of the Company. Fourth, that the promise was made in a letter, in the words and figures following:—"*Wood's Point*, 4th Dec., 1865.—The Manager of the Colonial Bank of *Australasia*, *Matlock*.—Sir,—We have to inform you, that we, as Directors of the *Loch Fyne Quartz Mining Company* have appointed Mr. *Charles Ernest Clarke* to be legal Manager of the Company, and have authorized him to draw cheques upon the account of the said Company. (Signed.) *Thomas Cherry, John M'Dougall*, Directors, *Loch Fyne Q. M. Company, Regd.*" Fifth, that the Colonial Bank of *Australasia*, *Matlock*, was a branch Bank, established at *Matlock*, of the Colonial Bank of *Australasia*, of the Plaintiffs, who had their principal establishment in *Melbourne*, and several branch Banks

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thereof throughout the Colony. Sixth, that as to £4,000, parcel of the money claimed, cheques of *Clarke* to that amount were drawn by him on the Bank by way of overdraft, and there was not at the time of their being drawn any money standing to the credit of the Company in the Bank out of which the same were payable. And seventh, to the money counts, that they never were indebted.

The Plaintiffs joined issue on the first, second, third, and last pleas, and demurred to the fourth, fifth, and sixth pleas. The Defendants joined in demurrer.

The action was tried before Mr. Justice *Barry* and a jury, when the following facts were proved:—That the Appellants were two of the Directors of the *Loch Fyne Gold Mining Company;* that previous to the month of December, 1865, the Company had opened an account with the Respondents' branch Bank at *Matlock;* that at that date the account of the Company with the branch Bank was overdrawn, of which the Appellants had notice; that on the 4th of that month the Appellants, as two of the Directors, wrote and signed the above letter, and sent it to the Respondents; that thereupon *Clarke* drew cheques, which were honoured by the Bank, which increased the overdrawn account; that the account was then, by consent of the Appellants and Respondents, transferred to the branch Bank at *Wood's Point;* that *Clarke* drew a cheque for £2,336. 19*s.* 3*d.* on the *Wood's Point* branch of the Respondent's Bank, in order to pay off the overdraft of the *Loch Fyne Gold Mining Company* at the *Matlock* branch; that the Pass-book was regularly furnished to *Clarke;* that he subsequently drew several other cheques, which were honoured, the amount of the overdraft being finally the amount claimed in the action. It was further proved, that the Appellants did not form such a majority of the Directors of the *Loch Fyne Gold Mining Company* as is required by the 21st section of the *Colonial Mining Companies Limited Liability Act,* 27 Vict. No. 228 (1), and were not empowered to

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(1) This section is as follows:—"Any Company registered under this Act, with the sanction of a majority in number and value of the Shareholders in such Company given at an extraordinary meeting, may, from time to time, increase its capital by the issue of new shares, such aggregate increase to be of such amount and divided into shares of such respective amounts as such majority directs; and also, from time to time, may borrow money, not exceeding such sum as such majority directs."

give *Clarke* the authority mentioned in their letter to the Respondents, or to authorize him to draw cheques on account of the Company.

Upon these facts the jury found a verdict for the Respondents for the full amount of their claim.

On the 27th of June, 1867, a rule *nisi* was obtained by the Appellants to set aside the verdict obtained by the Respondents, and to enter a nonsuit on the following grounds:—First, that the authority given to *Clarke* was a limited one, and that he was not justified in exceeding such authority. Second, that there was no evidence of any authority to *Clarke* to pledge the credit of the Company or overdraw, but only to draw on the funds of the Company in the Bank. Third, that the authority given to *Clarke* was not as stated in the declaration, but limited to drawing cheques on the Respondents' branch Bank at *Matlock*. Fourth, that there was no evidence of personal responsibility of the Appellants. Fifth, that there was no such promise as that declared on, and the letter signed by the Appellants substantially varied from the allegation in the declaration, which set forth that the Defendants promised the Respondents that *Clarke* was authorized by the Company to make drafts or cheques for them, as their Agent. Sixth, that there was no evidence of a promise by the Appellants that *Clarke* was duly authorized and empowered by the Company to make drafts or cheques for them, as their Agent. Seventh, that there was no evidence of the consideration stated in the declaration. Eighth, that there was no evidence to support the Respondents' issue on the second plea; and lastly, that there was no evidence that *Clarke* made any drafts or cheques on account of the Company, or any drafts directed to the Respondents, as stated in the declaration.

The Supreme Court gave judgment, on the 6th of September, 1867, in favour of the Respondents, on the points raised by the rule, but ordered the damages to be reduced by the sum of £2,245. 8*s*. 9*d*., on the ground, that cheques to that amount were drawn in respect of a balance incurred before the date of the before-mentioned letter, the judgment being, that the verdict should stand, and the damages reduced by the amount of £2,245. 8*s*. 9*d*.

The appeal was from this judgment.

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Mr. *Mellish*, Q.C., Mr. *J. O. Griffits*, and Mr. *F. W. Campion*, for the Appellants :—

This is simply a case of a Mining Company dealing with a Bank, and the latter, under a mistaken notion of the authority of the Appellants as two of the Directors, has allowed the Company's Manager to overdraw their account. The Company having changed their Manager, informed the Bank of such change by the letter which is the foundation of the action by the Bank against them. This letter contains no words of contract, it stipulates for no consideration, and shews no intention on either side to make a contract, yet the action brought is founded on a contract, and no contract is proved. The Appellants' Company was formed under the Colonial Act, 27 Vict. No. 228. That Act, by section 6, provides for the appointment of a Manager, and declares, that no action or suit shall be brought against any member of such Company for the recovery of any debts contracted from or by the Company, and section 7 limits such contracts in amount to £50. The power of the Appellants, as Directors, to bind the Company, by giving authority to *Clarke* to draw cheques for the Company, was a matter of law, not within the knowledge or intention of the Appellants: *Rashdall* v. *Ford* (1); *Chambers* v. *The Manchester and Milford Railway Company* (2). The Appellants as Directors acted only for the Company. Individual Directors cannot be made personally liable on a contract unless they have themselves in their individual character entered into it. The reasons for implying a warranty of authority in the case of contract made by one person on behalf of another, do not extend to notifications of acts done by Directors of a public Company in the exercise of their own or supposed powers as Directors: *Collen* v. *Wright* (3); *Behn* v. *Burness* (4); *Wilson* v. *Goodman* (5); *Fuller* v. *Wilson* (6); *Ricketts* v. *Bennett* (7); *Jones* v. *Downman* (8); *Williams* v. *Downman* (9). These cases shew the distinction between representation and warranty. The letter signed by the Appellants did not purport to authorize *Clarke* to overdraw. There was no evidence that the alleged loss was consequent upon

(1) Law Rep. 2 Eq. 750.
(2) 5 B. & S. 588.
(3) 8 El. & B. 647.
(4) 3 B. & S. 751.
(5) 4 Hare, 54.
(6) 3 Q. B. 58.
(7) 4 C. B. 686.
(8) 4 Q. B. 235, n.
(9) 5 Q. B. 103.

any contract contained in the letter, or that the Respondents would have sustained the same loss, if the letter had been authorized by the majority of the Company. Moreover, there was no evidence of any warranty of *Clarke's* authority to draw on the Respondents except at their *Matlock* branch. The hardship is extreme, if the Appellants are, under such an assumed contract, to be held personally liable.

Sir *John Karslake*, Q.C., and Mr. *Macnamara*, for the Respondents:—

The Appellants represented *Clarke* to be the duly authorized Agent of the Company. That is the plain purport and meaning of their letter to the Bank. If they had no authority as Directors to empower him to draw on account of the Company, they were personally liable for such damage as accrued to the Bank acting upon their representation, and it constituted a sufficient contract to sustain the action: *Thomson* v. *Davenport* (1). The sum for which the verdict stands was, in fact, money paid by the Respondents for the Appellants at their request, and for their benefit. The facts proved that there was sufficient evidence to maintain the action. If the Bank had refused to cash *Clarke's* cheques while they had money in hand of the Appellants, they would have been liable to an action. The power to overdraw was a matter specially within the knowledge of the Appellants, and the representation in their letter binds them: *Marzetti* v. *Williams* (2); *Lewis* v. *Nicholson* (3). It is very probable, that the Appellants intended to give *Clarke* authority to overdraw; and that the Respondents should suppose from their letter he had such authority, and that was sufficient to render them personally liable.

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Judgment was delivered, as follows, by

SIR JOSEPH NAPIER:—

This was an action of assumpsit brought by the Colonial Bank of *Australasia* against the Defendants, who were two of the Directors of the *Loch Fyne Quartz Mining Company*, registered.

The declaration states, that in consideration that the Plaintiffs,

(1) 9 B. & C. 78; Notes to Smith's L. C. vol. ii. p. 222 (2nd Ed.)
(2) 1 B. & Ad. 415. (3) 18 Q. B. 503.

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at the request of the Defendants, would honour and pay on account of the *Loch Fyne Quartz Mining Co.*, the drafts or cheques of one *Charles Ernest Clarke*, to be directed to the Plaintiffs, the Defendants promised the Plaintiffs that *Clarke* was duly authorized and empowered by the Company to make drafts or cheques for them as their Agent; and that the Plaintiffs, relying on the promise of the Defendants, did honour and pay, on account of the Company, divers drafts or cheques of *Clarke*, directed as aforesaid. It also states, that *Clarke* was not authorized by the Company to make the drafts or cheques as their Agent, by reason whereof the Plaintiffs lost the amount advanced upon them.

To this declaration defences were pleaded, in which the making of the promise by the Defendants, the drawing of the cheques, and the payment on account of the Company as alleged, were respectively denied, and issue was joined thereon.

The statement of the consideration was not expressly traversed, nor the allegation that *Clarke* was not authorized by the Company to make the drafts or cheques as their Agent. There were other pleas pleaded by the Defendants, which were demurred to on the part of the Plaintiffs, but it was conceded, that it was not necessary to notice these more particularly.

It appears from the evidence given at the trial that, before the month of December, 1865, the Company had opened an account with the branch Bank of the Defendants at *Matlock*, and that cheques were, from time to time, drawn upon the Bank by the then Manager of the Company, which were duly honoured and paid by the Bank on account of the Company. The account was overdrawn to the knowledge of the Defendants at the time when they signed the following Letter, and handed it to *Clarke*, who gave it to the Manager of the Bank:—[His Lordship read the letter, *ante*, p. 25, and proceeded:—]

After this letter was deposited by *Clarke* with the Manager of the Bank, advances were continued by the Bank on cheques drawn by *Clarke*, purporting to bind the Company. These cheques were duly honoured by the Bank on the faith of this letter. Under the 21st section of the Colonial Act, 27 Vict. No. 228 (1), the credit of the Company could have been pledged for advances on overdrafts,

(1) *Ante*, p. 26.

provided the borrowing had been authorized by a majority of the Shareholders, but not otherwise.

No evidence was offered to prove that such authority was given. The case proceeded on the assumption that *Clarke* had not authority to bind the Company by the cheques which he drew. There was no imputation of fraud in the transaction.

It was contended by Mr. *Mellish*, that on the face of the letter it appears, that the Defendants acted merely as Directors of the Company, and never meant to bind themselves otherwise than as Directors; that, therefore, they cannot be made personally liable. If the question was, whether the Defendants in fact intended to bind themselves personally, it might be admitted that such was not their intention. But it remains to be considered, whether upon the view which the jury were entitled to take of the evidence, the law does not imply a warranty to the Bank, on the part of the Defendants, that *Clarke* had authority to bind the Company so as to make them responsible to the Bank for the advances on the cheques.

In the case of *Downman* v. *Williams* (1), Chief Justice *Tindal*, in delivering the judgment of the Court of Exchequer Chamber, states, that where a contract appears upon its legal construction to have been entered into by an Agent on behalf of his Principal, the only ground on which the Agent could become personally liable thereon is that which has been stated by Mr. Justice *Story* in his Commentaries on the Law of Agency.

The ground therein stated is said to be, "a plain principle of justice; for every person, so acting for another, by a natural, if not by a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement," ch. x. § 364. According to the opinion of that eminent Jurist, if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. In short, says Mr. Justice *Story*, he undertakes for the truth of his representation.

(1) 7 Q. B. 111.

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This doctrine of an implied warranty in such cases seems to have met with the approval of the learned Judges who decided the case of *Lewis* v. *Nicholson* (1), although expressed with some reserve, as it was not necessary for them to decide the question.

It became necessary to decide it in the case of *Collen* v. *Wright* (2), and the decision of the Court of Exchequer Chamber in that case must be considered to have settled the law upon the subject, in conformity with the view of Mr. Justice *Story*. The remedy by a special action, where there is fraud or deceit, is a distinct matter, upon which no question is made.

It appears to their Lordships, that there was evidence upon which it was open to the jury to find that the Defendants, professing to act on behalf of the Company, had led the Plaintiffs to believe that *Clarke* had authority to draw cheques as the Agent of the Company, and thereby induced the Bank to make advances on the cheques, on the supposition that, as between the Bank and the Company, the latter was bound. It can make no difference that the engagement into which the Plaintiffs were thus drawn by the Defendants has to be collected by inference from the evidence laid before the jury. When it has been ascertained as a matter of fact, the legal effect is the same as if it had been express.

The warranty which the law implies depends on the position of the parties, and on the nature and effect of the representation.

The representation in this case was admitted on the record to be untrue.

Their Lordships agree with the Judges of the Supreme Court in thinking that, in this state of things, the law implies the warranty or undertaking on the part of the Defendants, as stated in the declaration, and that there was no ground for entering a nonsuit.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Court should be affirmed with costs.

Solicitor for the Appellants: *W. Thistlethwaite.*
Solicitor for the Respondents: *W. S. Payne.*

(1) 18 Q. B. 511, 513. (2) 8 E. & B. 647.

WILLIAM WILSON AND WILLIAM CROSBIE . APPELLANTS;

AND

GEORGE HAMILTON TRAILL . . . . . RESPONDENT.

J. C.*
1869
July 8.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA, AT MELBOURNE.

Foreign attachment—Victoria Common Law Procedure Act—Garnishee, proceedings against.

In proceeding by writ of Foreign attachment, under the *Victoria Common Law Procedure Act* (28 Vict. No. 274, s. 215), against a Garnishee who has parted with property that had been attached, it is essential that the property should actually, and not constructively, belong to the Defendant in the action; and being satisfied of that fact, the granting an issue to try the question of property, or making an Order against the Garnishee in respect thereof, is a matter for the discretion of the Court.

THIS was an appeal against a rule of the Supreme Court of the Colony of *Victoria*, making a previous Order a rule of Court. The Order had been made by a Judge of the Supreme Court dismissing a garnishee summons in an action between the Appellants and one *Threlkeld* (trading under the name of *L. E. Threlkeld & Co.*)

The Appellants were Merchants at *Melbourne*, and on the 17th of May, 1866, purchased, through *John Everard & Co.*, Tea Brokers, in *Melbourne*, from Messrs. *L. E. Threlkeld & Co.*, Auctioneers, at *Sydney*, a large quantity of tea, and in the following month Messrs. *Threlkeld & Co.* deposited with the *Oriental Bank Corporation*, at *Sydney*, to be transmitted to their branch at *Melbourne*, certain Bills of Exchange drawn by them upon the Appellants against the consignment of the tea, and gave directions to the Bank to present the Bills for acceptance and to collect the amounts at maturity.

About the time of such deposit 318 and 49 chests of tea were shipped by Messrs. *Threlkeld & Co.* to *Melbourne*, and the Bills of lading were delivered to the Bank, with directions to deliver the teas to the Appellants on their acceptance of the Bills of exchange so drawn upon them. The teas reached *Melbourne* in due course, but on presentation of the Bills to the Appellants they refused to

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., and The LORD JUSTICE GIFFARD.

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accept them, on the ground that some parcels of the tea did not correspond with that which they had purchased.

The Appellants then brought an action in the Supreme Court against *Threlkeld & Co.* for non-delivery of the tea which had been purchased.

The writ in such action was returned *non est inventus*, and on such return the Appellants issued a writ of Foreign attachment, directed to the Respondent, as Manager of the Bank, attaching the teas in his hands for the purpose of making satisfaction to the Appellants. The writ was issued, and the proceedings thereupon were taken, under sects. 211 (1) and 216 (2) of the *Victoria*

(1) Section 211, is as follows:—

"In every action at law in the Supreme Court on or arising out of contract, and in every action in such Court for the conversion or detention of goods wherein the Writ of Summons or of Capias shall (as to any Defendant named therein) be returned *non est inventus*, if upon or after such return an affidavit shall be filed on behalf of the Plaintiff (in addition to a full affidavit of the cause of action) that such cause of action arose within *Victoria*, and that to the best of Deponent's belief such Defendant does not reside within the Colony, and is, to the best of Deponent's belief, possessed of, or entitled to, or otherwise beneficially interested in, any lands, moneys, securities for money, chattels, or other property in the custody or under the control of any person or persons in the Colony, hereinafter called the Garnishee or Garnishees (to be named in such affidavit), or that any such person or persons is or are indebted to such Defendant, the Plaintiff may proceed against such Defendant by process of Foreign attachment in the manner hereinafter directed: Provided that by leave of a Judge (where it shall appear that the Plaintiff may sustain injury by the delay) such affidavit may be filed before the return of such Writ of Summons."

(2) The material part of section 216, is as follows:—

"Upon the return of every such Writ of attachment as aforesaid, or as soon after as conveniently may be, and upon such other day or days of adjournment (if any) as shall in that behalf be directed, the said Court or one of the Judges thereof shall proceed to inquire and determine whether in fact the Plaintiff's cause of action arose within *Victoria*, and if so, then what lands, moneys, chattels, and other property as aforesaid (sufficient or not more than sufficient to satisfy the Plaintiff's cause of action, together with his costs of suit) then are, or were at the time of the service of the said Writ, in the custody or under the control of any such Garnishee, or person as aforesaid, belonging to the Defendant, or to or in which he was at that time entitled or interested as aforesaid, and what debts were then due to such Defendant from any such Garnishee or person, and the particulars thereof, and whether such lands, moneys, and other property and debts, or any part or parts thereof, are or can be made available for the purpose of making such satisfaction as aforesaid, and to what amount respectively; and for the purposes of such inquiry and determination it shall be lawful for the said Court or Judge in a summary way to examine

Common Law Procedure Act, 1865 (28 Vict. No. 274). The affidavit required by section 211 was made.

Upon the return of the Writ of attachment an Order was made, dated the 23rd of October, 1866, fixing the amount of a Bond subsequently entered into by the Appellants, pursuant to the 220th section of the above Act, for the repayment to the Defendant *Threlkeld* of such sums as the Appellants, the Plaintiffs, should recover in the action, in case judgment therein should be vacated or reversed.

The Respondent was also examined by one of the Judges of the Supreme Court as to the teas in possession of the Bank, which he admitted to have been sent by the Defendant *Threlkeld*, but did not disclose, as the fact was, that he had received notice that the teas at the time of their consignment to the Bank were, and from thence had continued to be, the property of Messrs. *A. Tange & Co.*, Merchants, of *Sydney*, by whom they had been placed in the hands of *Threlkeld & Co.* for sale on their account; and therefore that fact did not appear from his examination.

On the 20th of November, 1866, the following Order, purporting to be based on the minute of the above Order of the 23rd of October, 1866, was made by the same Judge, and drawn up:—

"I do Order, that 218 chests of tea, part of 367 chests of tea belonging to the Defendant, *Lancelot E. Threlkeld*, now in the hands of the said *George Hamilton Traill*, Acting Manager of the *Oriental Bank Corporation*, be sold by the said *George Hamilton Traill*, and that the proceeds of the sale of the said 218 chests of tea be henceforth holden by the said *George Hamilton Traill* subject to the said Writ of Foreign attachment issued in this cause, for the purpose of making satisfaction to the Plaintiffs for

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or permit the said Plaintiff to examine *vivâ voce* upon oath every such Garnishee or person, together with such witnesses (if any) as the said Court or Judge may think proper to be so examined, and for that purpose to make such Orders and issue such Summonses to the several Garnishees and to any witness or witnesses as may in that behalf be deemed expedient, and any such Garnishee, or person as aforesaid, or witness who shall refuse or neglect to attend according to the exigency of any such Writ of attachment, or to obey any such Order or Summons, or shall refuse to be so examined, shall be liable to be summarily proceeded against as in cases of contempt of Court, and to be punished accordingly."

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their said claim in this action; and I do further Order, that as to the remaining 149 chests of tea belonging to the Defendant, *Lancelot E. Threlkeld*, now in the hands of the said *George Hamilton Traill*, the said Writ of Foreign attachment be dissolved."

On the 26th of the same month the Appellants proceeded, under section 218 (1) of the before-mentioned Act, in the action as if *Threlkeld & Co.* were residing in *Victoria*.

On the 5th of December, 1866, the Respondent obtained a rule *nisi* to set aside the before-mentioned Order of the 20th of November, 1866, on the ground, that there was no jurisdiction to direct the sale therein directed, and that the proceeds of the sale should have been ordered to be paid into Court; and on the 24th of December, 1866, such rule was made absolute.

On the 9th of January, 1867, the Appellants' Attorney, without having previously given notice to the Respondent, or to *Threlkeld*, of their intention so to do, obtained the signature of Mr. Justice *Williams* to an Order of attachment, dated back, viz.—on the 20th of November, 1866; which was in the same terms as the first Order of that date, which had been set aside, except that such second Order omitted the direction for the sale of any part of the teas.

The Respondent was served with this second Order on the 9th of January, 1867; but he had, between the dismissal of the Order of the 20th of November, 1866, of attachment and sale, and the obtaining of the second Order, on the 24th of December, 1866, taken Counsel's opinion as to what course he should pursue, under the circumstances of the case, and under his advice had re-shipped the teas to the *Oriental Bank Corporation* at *Sydney*, who had on the 21st of January, 1867, delivered them up to the Messrs. *Tange & Co.*, without any payment or security to them, and without any agreement or promise for any payment or security, and without insisting upon any lien on such teas or any of them.

A Summons was issued under sect. 215 (2) by the Appellants

(1) Section 218 was in these terms:—

"At any time after the return day of any such Writ of attachment, it shall be lawful for the Plaintiff to proceed in the action as if such Defendant resided in *Victoria*, and had appeared to such action in person: Provided that such Bond as is hereinafter in that behalf prescribed shall have been first duly entered into."

(2) Section 215 was in these terms:—

"From the time of the service of such Writ upon any such Garnishee or person as aforesaid, all and singular

on the 12th of February, 1867, against the Respondent to shew cause why he should not pay such damages as to the Judge should seem meet, and the costs of the application, on the ground that he had disposed of or parted with, and sent out of the jurisdiction of the Court, the goods attached in his hands to satisfy the Appellants' claim.

Mr. Justice *Williams*, on the 5th of September, 1867, dismissed the Summons, but without costs; and on the 16th of September, 1867, the last-mentioned Order was made a rule of the Supreme Court.

The Supreme Court, for the purposes of this appeal, transmitted the following written reasons for the dismissal of the Summons, and for not directing an issue in the matter:—

"In this case the Plaintiffs, Merchants in *Melbourne*, purchased through a Broker from the Defendant, an Auctioneer in *Sydney*, *New South Wales*, certain parcels of tea; part were delivered and payment made generally on account, but some parcels did not correspond with the tea purchased, and the Plaintiffs refused to accept them, and brought an action for non-delivery. These parcels had been shipped from *Sydney* to *Melbourne*, to be delivered to the Plaintiffs in pursuance of the contract; the Defendant drew on the Plaintiffs for the amount, transmitted the Bill of Exchange

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the lands and other hereditaments, moneys and chattels, bills, bonds, and other property, of whatsoever nature, in the custody or under the control of such Garnishee, then belonging to the Defendant, against whom such Writ issued, or to or in which such Defendant shall then be legally or equitably entitled, or otherwise beneficially interested (and whether solely or jointly with any person or persons), and all debts of every kind then due by any such Garnishee to such Defendant, although the same, or part thereof, may be payable only at a future day, shall, to the extent of such Defendant's right, title, and interest therein respectively, be attached in the hands of such Garnishee, and (subject to any *bonâ fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which he or she shall, by the said Writ, have had notice; and if any such Garnishee or person, without the leave of the Court or one of the Judges, shall at any time after such service, and before the said attachment shall be dissolved, sell or otherwise knowingly dispose of or part with any such property, or pay over any such debt, or any part thereof, excepting only to or to the use of the Plaintiff in such Writ, he or she shall, upon the application in a summary way of such Plaintiff to the Court, or any Judge thereof, and on proof of the facts, pay such damages to the Plaintiff as such Court or Judge shall in that behalf think fit to order."

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through the *Oriental Bank* for collection, and lodged the Bill of lading in the Bank to protect the Bank in the event of the Plaintiffs not accepting the Defendant's drafts on them. As the Defendant was not found on the return of the Writ of Summons in the action, the Plaintiffs proceeded by Foreign attachment, and the parcels of tea in question were attached in the hands of *George Hamilton Traill*, Acting Manager of the Branch of the *Oriental Bank* at *Melbourne*, to answer the Plaintiffs' claim in the action. On the return of the Writ of attachment the Manager was examined as Garnishee; he had previously been served with notice by *Anton Tange*, a Merchant in *Sydney*, that all these parcels of tea were his property, and not that of the Defendant, *Threlkeld*. They had been merely placed in the Defendant's hand as an Auctioneer for sale, and the Defendant corroborated in writing these statements. The Manager, in his examination as Garnishee, made no allusion to this notice having been served on him, and the parcels of tea were attached by an Order of the 20th of November, 1866, as if they really belonged to *Threlkeld*, the Defendant; the Order, at the request of the Garnishee, directing that part of the tea should be sold, and the proceeds retained in his hands to satisfy the Plaintiffs' claim. This Order was afterwards set aside by a rule of Court, of the 24th of December, 1866, on the ground of informality in their directing any of the tea to be sold. The attachment it was not intended should be disturbed. An Order was subsequently issued in the proper form, and served on or about the 9th of January, 1867; but before it had been served, and on or about the 4th of that month, all the tea then under the control of the Branch in *Melbourne* had been, by directions from the central office in *Sydney*, removed there from *Melbourne*. The present application was made to a Judge in Chambers, under the *Common Law Procedure Act*, 28 Vict. No. 274, s. 215, that the Garnishee should be ordered to pay such damages as the Judge should in that behalf think fit. The application was referred to the Court, and the Order pronounced was finally, for the purpose of appealing to the Judicial Committee of Her Majesty's Privy Council, made a rule of Court. As the judgment was delivered on the argument of the application by Summons, the case may now be treated as if it had rested there. The application was opposed on

various grounds; amongst others, that the attachment had been dissolved by the rule of the 24th of December, 1866, and the tea removed before the amended Order had been served; that the tea had been removed by the Bank and not by the Acting Manager, and that redress should be sought against the Bank; and that the tea was not the property of the Defendant, but of *Anton Tange*. The last seemed to us the meritorious ground of defence, and we have dealt with it alone. The Plaintiffs demand damages in consequence of the Garnishee having disposed of or parted with such property. These words must, in our opinion, refer back to the words in the earlier part of the section, 'Then belonging to the Defendant,'—property which might not only be attached, but be liable to the satisfaction of the cause of action; if not the property of the Defendant it would not be so liable, and the Plaintiffs would not be damnified by any disposition thereof by the Garnishee. The evidence, that it is not the property of the Defendant, consists of the statement on oath of *Tange*, and of the Defendant himself, the affidavit of the Defendant having been made before, but not filed until after the Order had been pronounced. The facts that *Tange* at once, on hearing of the Writ of attachment, and before it was returnable, preferred his claim, instructing an Attorney to give the necessary notice, and that notice was given, and also the corroborative circumstances, as appeared by the affidavits subsequently filed, that the Bank on the spot in *Sydney*, where both *Tange* and the Defendant were resident, on the advice of Counsel, gave up these teas, although the Bank was a Creditor of the Defendant, and claimed a lien on the teas as having been placed in their hands in the way of business, and by the Defendant as a Customer; against this evidence there is merely the inference or conjecture, that because the Defendant, as Auctioneer, adopted what is said to be an unusual course, of drawing himself on the Plaintiffs for the purchase-money, instead of making his Principal do so, the tea must have belonged to him, and not to *Tange*, the Claimant. Had these Bills of Exchange been discounted by the Defendant the inference would have been much stronger; but even then it would scarcely have amounted to proof: many reasons might have contributed to rendering such a course advisable on the part of the Defendant. We think the evidence is all one way, and that we

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should not be justified in directing an issue in such a matter. There is no doubt the Garnishee might have prevented any difficulty on the point, by stating at the time of his examination the fact of his having been served with a notice of the claim; but as Garnishee he is a mere witness, and may not have felt at liberty to volunteer a disclosure of facts. His conduct was, in our opinion, unjustifiable; but except as regards the costs of the application it is not important. It does not affect the real question at issue. We were pressed with the argument that no Garnishee should be permitted, after an Order has been made attaching certain property as belonging to the Defendant, to take upon himself to decide whether it did so belong or not. We believe the property in question was removed under the impression that the attachment had been dissolved, and that the attachment by issuing of the Writ had been overlooked; but even if this were not so, the question of property is, in our opinion, a question of jurisdiction. We have no option in the matter. If the property, whether rightly or wrongly attached, did not then belong to the Defendant, we have no power to order in a summary way the person who removes, it may be, his own property, to pay damages to another who is not thereby damnified. We need not consider how any contempt of the Court should be punished—that is not the present application; the *onus* of proving the facts rests, in our opinion, with the Plaintiffs. They have failed to establish them so as to sustain our jurisdiction, and the Summons must be dismissed, but, for the reasons we have already assigned, without costs."

The appeal was from the above Order of the 16th of September, 1867.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Appellants:—

This is a question of Foreign attachment arising under the *Victoria Common Law Procedure Act* of 1865, the 28 Vict. No. 274. The proceedings were taken under the 211th and 216th sections. The first of these sections gives the right to the process after the return of *non est inventus* to the Writ of Summons or *Capias* in an action, and the 216th section empowers the Supreme Court, or one of its Judges, to inquire into the property alleged to be in the hands of the Garnishee, and to make such Order thereon as the Court or

Judge shall think fit. Now, all the steps necessary under those sections were taken, and when the Respondent, the Garnishee, was examined by the Judge he admitted that the teas had been consigned to his firm by *Threlkeld*, but did not disclose, as in all good faith he ought to have done, that they were the property, or alleged to be the property, of *Tange*. For the purposes of the attachment, therefore, the property in the teas was sufficiently proved to be in *Threlkeld*: *Seymour* v. *The Corporation of Brecon* (1). The Respondent was estopped by his conduct from denying that *Threlkeld* was the Owner of the teas, and we were entitled to have an issue directed for the purpose of trying the question, whether the teas in the hands of the Respondent as Manager of the *Oriental Bank* did or did not belong to *Threlkeld*: *Gosling* v. *Birnie* (2); *Kieran* v. *Sandars* (3). The law is very clearly laid down in *Brandon* on Foreign Attachment: he says: "The ownership of the Defendant in the property must be considered, having regard to the relative position of the Defendant and the Garnishee in the contracts and transactions between them. Because where the Garnishee cannot raise the want of title of the Defendant in the property attached, as a defence to any action brought by the Defendant against him for the same, he cannot raise it as a defence in the trial of the attachment, as in the attachment the Plaintiff has every right against the Garnishee that the Defendant had." (p. 48.) And he adds: "Neither will an attachment of the price of goods sold to the Garnishee by the Defendant (an Agent) under a contract in the name of the Defendant without disclosing his Principal, be defeated by evidence on the Trial that the Defendant had no interest in the goods except as Agent of some other person." The parting with the goods after the Order of the Court, and while the attachment was subsisting, was not only such an act as rendered the Respondent personally liable to be proceeded against under the 215th section of the Act, but was such a contempt of Court as ought to have been noticed and punished by the Court itself. We were clearly entitled to an issue as to whom the teas in reality belonged.

Sir *R. Palmer*, Q.C., and Mr. *Macnamara*, for the Respondents, were not called upon by their Lordships.

(1) 29 L. J. (N.S.) Ex. 243. (2) 7 Bing. 339.
(3) 6 Ad. & E. 515.

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Judgment was delivered by

SIR JAMES W. COLVILE:—

It may be well, before stating the views of their Lordships upon the particular point involved in this appeal, to consider what the position of the parties was. The Plaintiffs in the action, the Appellants in this appeal, being resident in *Melbourne*, made a contract through their Agents at *Sydney* for the purchase of certain teas. Upon the face of the contract those teas appeared to be the teas of *Threlkeld*, who now is found to have been the Agent of an undisclosed Principal, *Tange*. The teas were sent to *Melbourne*, and the form of the action shews that the Purchasers, the Appellants, had treated them as not being such teas as they had contracted to purchase, and they accordingly brought their action to recover the moneys which they had paid under the contract. Therefore, that clears the question as to the property in the teas. The teas in the hands of the Garnishee were the property of the Vendor, whoever that Vendor might be.

The action was brought against the ostensible Vendor, *Threlkeld*, in the Supreme Court at *Melbourne*. Neither *Threlkeld* nor *Tange* was personally subject to the jurisdiction of that Court. The Plaintiffs, therefore, took advantage of this law of Foreign attachment, and upon the return of *non est inventus* to the Writ of Summons, they attached these teas as the teas of *Threlkeld* in the hands of the Garnishee.

Then took place those various proceedings which their Lordships do not think necessary to enter into particularly, but the result was, that the Garnishee (for it will be convenient in dealing with this appeal to treat the acts of the Bank of which he was an Officer as his acts), finding, as he says, that the teas were not the teas of *Threlkeld*, that they were claimed, and properly claimed, by *Tange*, and that the Bank had not any lien upon them, parted with the teas, and sent them back to *Sydney*.

In these circumstances, the Appellants applied against the Garnishee for a Summons under the 215th section of the *Common Law Procedure Act*. It is scarcely necessary to read again that section which has been so much commented on, because it is perfectly clear—it is almost admitted—that it was essential both to the

validity of the original attachment and to the prosecution of the remedy which the 215th section gives against a Garnishee who parts with the property that has been attached, that the property should belong to the Defendant in the action.

The question to whom these teas belonged cannot, in their Lordships' opinion, be affected by any of those principles which are sometimes applied to sales by an Agent on behalf of an undisclosed Principal, and give to the Vendee such rights of set-off, or the like, as he would have had if the property in the thing sold had been really and not ostensibly in the Agent.

In those cases the contract subsists, and the question is in what mode it is to be carried out. Here there has been a breach of contract, and the party is suing in a particular way for the money which he has paid under that contract as upon a failure of consideration, and for damages sustained by reason of the breach of contract. The words of the section require that the property attached should belong to the Defendant. They imply an actual and not merely a constructive ownership in him. Their Lordships have already in the course of the argument intimated that there is no ground for saying that the Garnishee was estopped by his conduct from shewing in whom the actual ownership was.

Upon the Summons various affidavits were filed upon both sides, and the Judge came to the conclusion, that the property in the teas was really in *Tange* and not in *Threlkeld*, the Defendant in the action, and, therefore, that it was impossible to say that the Defendant had sustained any damage by reason of the Garnishee parting with property which was not properly subject to the attachment at all, and accordingly he dismissed the Summons.

The only substantial questions that seem to be raised by this appeal are, whether the Court on the evidence before it should have come to a contrary conclusion, or whether the case was left in such a state of doubt that the Court ought, under the power which a subsequent section gives it, to have directed an issue as to the question of property to be tried?

Their Lordships are of opinion, that the first question must be answered in the negative; that upon the affidavits it is impossible to say that the balance of testimony was not against the contention of the Appellants.

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With respect to the other question, although at times in the course of the argument their Lordships may have felt more doubt concerning it, yet, looking to the affidavits, as corroborated by the acts of the parties, and the inferences which arise from the Bank at *Sydney* giving up its claim of lien against *Threlkeld* on the conviction that the property was the property of *Tange*, they cannot say that there was such a case of doubt that the Court below, in the exercise of its discretion, has erred in not granting an issue to try that question.

Their Lordships, therefore, feel that it is impossible for them to to say, that the judgment of the Court below is wrong, or that the Court was bound in its discretion to grant an issue, and they must humbly advise Her Majesty to dismiss this appeal with costs.

Solicitors for the Appellants: *Laurie & Keen.*
Solicitors for the Respondents: *Fuller & Saltwell.*

J. C.* 1869 *Nov.* 26, 27.

THE GENERAL STEAM NAVIGATION COMPANY, THE OWNERS OF THE STEAMSHIP VELOCITY . . . . . } APPELLANTS;

AND

THOMAS HEDLEY, GEORGE HEDLEY, AND WILLIAM HEDLEY, THE OWNERS OF THE STEAMSHIP CARBON . . . . . } RESPONDENTS.

THE "VELOCITY."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping—Collision—Steering and Sailing Rules—Merchant Shipping Act, 1862.

Construction of Articles 13, 14, and 18, of the Steering and Sailing Rules of the *Merchant Shipping Acts Amendment Act* of 1862 (25 & 26 Vict. c. 63).

In inferring the intended movements of a Vessel approaching from a contrary direction, the relative position of the two Vessels when they first come

* *Present:*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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in sight of each other must not alone be regarded; other circumstances, such as the bend of the River, or the necessity of avoiding another Vessel, which may occasion the apparent alteration of course, must be considered.

By the *Merchant Shipping Acts Amendment Act* of 1862, Vessels navigating narrow channels are at liberty to go on whichever side they please, taking care to observe the Regulations for preventing collision.

A Steam-vessel coming up the River *Thames* came in sight of another Steam-vessel proceeding down the River at the time she was rounding a bend of the River, and for that purpose had placed her head in such a direction that, unless her course was changed, the Steamers would, if the former kept her course, cross each other so as to involve risk of collision; whereupon the Steamer coming up the River, having the other on her starboard side, changed her course so as to keep out of the way, if the other Steamer followed the direction in which her head was turned: the latter not doing so, but pursuing her intention of rounding the bend of the River, the two Steamers came in collision. A suit having been instituted against the Steamer rounding the bend of the River, the Judge of the Admiralty Court held, that the Plaintiffs' Steamer had only done what was required of her under the 14th Article of the Regulations for preventing collisions, which directs, that "if two Ships under steam are crossing, so as to involve risk of collision, the Ship which has the other on her own starboard side shall keep out of the way of the other:"—On appeal, *held*, by the Judicial Committee, that the decree was wrong, that the 14th Article did not, in the circumstances, apply, and that the Plaintiffs' Steamer was, therefore, not justified by it: that the Steamer sued was acting in conformity with the 18th Article, which directs, that where by the Steering and Sailing Rules "one of two Ships is to keep out of the way, the other shall keep her course;" and that the Steamer sued was not in any way to blame.

THIS was a cause of damage promoted by the Respondents in consequence of a collision which occurred between the Steam-vessel *Velocity* and the Steam-vessel *Carbon*, under the following circumstances:—

Early in the morning of the 5th of September, 1868, the *Velocity*, a Steam-vessel of about 179 tons register, and drawing about nine feet of water, left *London*, bound for *Calais*, with a light cargo, and with twelve Passengers on board. After passing *Cuckold's Point*, up to which point the *Velocity* had been proceeding along the south shore of the River, she crossed the River, and then kept along the north shore, passing *Millwall Pier* at a distance not greater than a ship's length. She rounded *Millwall Pier* under her starboard helm, and continued under the starboard helm so as to hug the north shore. The River there takes a considerable bend, necessitating a Vessel going down the River using her starboard helm. When the *Velocity* was off the *Millwall Pier*, a Vessel

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shewing a green light, which afterwards proved to be the *Carbon*, a Screw Steamer of 399 tons, was observed by the Master of the *Velocity* about the distance of a quarter of a mile, bearing two points on the starboard bow, and to the south of mid-channel. At this time there appeared to him to be no risk of collision; and, accordingly, he did nothing but starboard his helm a little, for the purpose of keeping as near to the north shore as the depth of water would allow. Very shortly afterwards, however, the helm of the *Carbon* was ported, so as to make her come right across the river. It was then impossible for the *Velocity* to have avoided a collision with the *Carbon*, whereupon the Master of the *Velocity* put his Vessel's helm hard-a-starboard, in order to run her ashore, and thereby save the lives of the Passengers. The collision, which had thus become inevitable, took place close to the north shore, the stem of the *Carbon* striking the starboard bow of the *Velocity*, and both Vessels taking the ground. The Appellants brought an action in the Court of Exchequer against the Respondents, to recover damages in respect of the aforesaid collision; the Respondents pleaded not guilty, and issue being joined on this plea, the action was tried before the Lord Chief Baron and a special jury at the *Guildhall*. On such trial the jury found a verdict for the Appellants, with damages. On an application for a new trial the Court refused to grant a rule *nisi*.

A suit was also brought by the Respondents in the High Court of Admiralty against the *Velocity*, when the contention on behalf of the Respondents was, that the *Carbon* was right in porting, and that the two Steam-vessels were crossing Ships within the meaning of the 14th of the Sailing and Steering Rules.

After hearing the evidence, the Judge (The Right Hon. Sir *Robert Phillimore*) and Trinity Masters were of opinion, that the two Steamers were crossing each other within the meaning of the 14th of the Steering and Sailing Rules, and that the *Velocity* was solely to blame for the collision, and the learned Judge decreed accordingly.

From this decree the Appellants appealed.

Mr. *Milward*, Q.C., Mr. *Butt*, Q.C., and Mr. *Cohen*, for the Appellants:—

Contended, that the judgment of the Court below was erroneous

and ought to be reversed, because from the evidence it was apparent that the two Steamers were not crossing each other so as to involve risk of collision within the meaning of the 14th of the Steering and Sailing Rules relied on by the learned Judge of the Court below; that the Judge was wrong in holding that the *Velocity* ought to have ported her helm, or that she erred in keeping her course round the bend of the River. That she was in a proper position in the River, and those who were on board the *Carbon* had no reason to expect her to cross the River. That the *Carbon's* helm was improperly ported, and that this caused the collision, which would not have taken place if each Steamer had kept her course. They insisted also, that the verdict in the Court of Exchequer had determined the liability to blame, the jury having found that the collision was not occasioned by the improper navigation of the *Velocity*, and that even if such verdict did not operate by way of estoppel, yet that the learned Judge was wrong in holding that he was bound to disregard that verdict altogether.

The Admiralty Advocate (Dr. *Deane*, Q.C.), and Mr. *Clarkson*, for the Respondents:—

Submitted, that the *Carbon* having the *Velocity* on her starboard side crossing her, she was bound, under the Rule 14 of the Steering and Sailing Rules, to keep out of her way, and that porting her helm was a proper measure to take. That, under Rule 18, the *Velocity* ought not to have starboarded, but to have kept her course; that if the case fell within Rule 13, the *Carbon* was right in porting, and that the *Velocity* ought to have ported and not starboarded her helm.

Judgment was reserved, and now delivered by

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Dec. 6.

LORD CHELMSFORD:—

This an appeal from a decree of the High Court of Admiralty in a cause of damage instituted by the Owners of a Steam-vessel, the *Carbon*, against the Owners of the Steam-vessel, the *Velocity*, for the damage done to the *Carbon* in a collision between the two Vessels, for which collision the learned Judge held that the *Velocity* was alone to blame, and decreed accordingly.

In the course of the argument on the appeal their Lordships

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were informed by the Counsel for the Appellants that the Owners of the *Velocity* had brought an action-at-law against the Owners of the *Carbon*, and had obtained a verdict with damages. That upon an application to the Court of Exchequer for a new trial, the Chief Baron (who tried the cause) expressed his entire satisfaction with the verdict, that the Court would not grant even a rule *nisi* to set it aside, and afterwards refused to give the Defendants leave to appeal.

This verdict must have proceeded upon the ground of the *Carbon* having been solely in the wrong; because, if there had been any fault contributing to the collision on the part of the *Velocity*, although there was even a greater degree of blame imputable to the *Carbon*, the Owners of the *Velocity* would not have been entitled to succeed at law. It is, perhaps, difficult to resist the influence arising from the successful issue of this proceeding at law by the Appellants, but their Lordships have endeavoured to confine their minds entirely to that which alone is properly before them, the evidence given in the Court of Admiralty, and the reasons stated by the learned Judge for the decree which he pronounced.

The collision took place in the *River Thames*, a little below *Millwall Pier*, at about 3·45 A.M., on the 5th of September, 1868. It was a fine moonlight morning, and the tide was about high water, and slack. The *Velocity*, a Steam-vessel of 179 tons, was going down the River on her way to *Calais*. The *Carbon*, a Screw-steamer of 399 tons, was proceeding up the River to *London* with a cargo of coals. The *Velocity* had been on the south side of the River until she arrived at *Cuckold's Point*, when she crossed over to the north shore, and just before the collision was rounding *Millwall Pier* and making her way along the north shore under a starboard helm. The *Carbon* was going up the River in mid-channel, and at about a quarter of a mile distance saw the red or port light of the *Velocity* bearing a little on her starboard bow. The helm of the *Carbon* was immediately ported, which carried her towards the *Velocity*. The Captain of the *Velocity*, seeing the danger of a collision, first starboarded the helm and afterwards ordered it to be put hard-a-starboard, so as to get his Vessel ashore, and save the lives of those on board, and the *Carbon* ran into her starboard bow and cut her from the deck down to the keel.

It was admitted on both sides, that this was not a case of two Steam-vessels meeting end on, or nearly end on, so as to require each of them to put the helm to port in obedience to the 13th Article of the Regulations for preventing Collisions at Sea. But it was considered by the learned Judge of the Court of Admiralty, that the 14th Article applied, and that the two Vessels under steam were "crossing so as to involve the risk of collision, and that it was, therefore, the duty of the Vessel which had the other on her starboard side to keep out of the way."

The learned Judge, in delivering his judgment, said, "We" (that is, himself and the Elder Brethren of the *Trinity House* by whom he was assisted) "think that the evidence establishes that the *Carbon* saw the mast-head and port light of the *Velocity* alone. The Vessels were, therefore, crossing under the rule to which I have referred" (the 14th), "and it was, therefore, the duty of the *Carbon* to get out of the way of the *Velocity*. The course which the *Carbon* adopted was to port, and the Elder Brethren think that this was the only mode of getting out of the way, in the circumstances." But the fact of the *Carbon* having seen the port light of the *Velocity* does not necessarily prove that the *Velocity* was crossing the River, as the learned Judge and his Assessors seem to have thought. The relative position of the two Vessels when they first came in sight of each other must not alone be regarded, but also the bend of the River in the part where the collision took place. A Vessel rounding the curve of the north shore would necessarily, during some part of her course, have her head slightly inclined towards the south shore, so as to exhibit her port light to a Vessel in mid-channel coming in a contrary direction; and, in fact, the *Velocity* was not crossing, or intending to cross, the River when she was seen by the *Carbon*, but was pursuing the regular course along the north shore; keeping as near to that shore as was convenient under a starboard helm. The Appellants alleged, that this was the well-known customary track for Vessels going down the River, and to establish their case in this respect they called Captain *James*, the principal Harbour-master of the River, who said, "It is the custom that Vessels going down, whatever be their tonnage or their cargo, and whether at flood or ebb tide, invariably keep on the north side, and Vessels coming up invariably keep on the south

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side." The Quartermaster of the *Dreadnought Hospital-ship*, which is moored not far from the place where the collision occurred, also stated that the regular course of Steamers going down the River is to keep on the north side; and the Captain of the *Velocity*, who has been thirty-three years in command of Vessels belonging to the *Steam Navigation Company*, said that for twenty years he had always in going down the River gone as close as he could to the north shore, as his usual track and the shortest way.

That there has been a practice for Vessels going down the River to prefer the north to the south shore is proved by the above evidence, but that there was any custom of this kind in the strict sense of the word, to which all Vessels would be bound to conform, is certainly not the fact. On the contrary, from the year 1854 down to the year 1862, the rule laid down by Act of Parliament required Vessels going down the River to keep towards the south shore. By the 297th section of the *Merchant Shipping Act* of 1854, it was enacted that "every Steamship when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such Steamship." Therefore, the Captain of the *Velocity* in running down the River on the north shore, which he stated to have been his invariable practice for twenty years, was, for some of those years, acting in direct disobedience to the Act of Parliament. But, in 1862, by the *Merchant Shipping Acts Amendment Act* (17 & 18 Vict. c. 104), the 297th section of the former Act was, by the 2nd section of the latter Act, repealed, and Vessels navigating the River were left at liberty to go on whichever side of it they pleased, taking care, of course, to observe the Regulations for preventing collisions. The *Velocity*, at the time when she was seen by the *Carbon*, was where, under the existing law, she had an undoubted right to be, and was pursuing her regular course along the north shore, when her red light presented itself to the *Carbon's* view. Now, if the persons in charge of the *Carbon* knew, as they ought to have known, the bend of the River in that part, and also knew that it was usual for Vessels going down the River to steer their course along the north shore, they had no more right to assume that the *Velocity* was in the act of crossing the River than that she was pursuing an ordinary course in her way down the River. The

learned Judge of the Court of Admiralty held that, as the Vessels were crossing, the *Carbon* ought to have kept out of the *Velocity's* way; and the Counsel for the Respondents argued that, if this were the case, the *Velocity*, by the 18th Article of the Regulations, ought to have kept her course,—which they interpreted to mean, that she should have followed the direction in which her head happened to be turned at the time when she was seen by the *Carbon*. But such an interpretation of the Rule would lead to constant uncertainty and perplexity, as the course of a Vessel would be continually varying whenever she had to turn out of the way to avoid any other Vessel, or might be compelled to follow the turns and windings of a River.

If the 18th Article applies, the *Velocity* was bound to keep her course down the River on the north shore, and this course she kept till collision with the *Carbon* was imminent, when she put her helm hard-a-starboard to run herself on shore. Their Lordships are of opinion, however, that this was not a case in which either the 13th or the 14th Article of the Regulations was applicable. It was admitted that this was not a case of two Ships under steam meeting end on, or nearly end on, under the 13th Article, and in their Lordships' judgment, the *Velocity* and the *Carbon* were not "crossing" within the 14th Article. But putting the Regulations aside, they are at a loss to discover what possible blame can be imputed to the *Velocity*. She had a perfect right to be where she was, and she was pursuing an usual course of navigation down the River, from which she never deviated until forced to do so by the peril of a collision into which she was brought by the sudden change of course of the *Carbon*. On the other hand, the *Carbon* appears to their Lordships to be wholly to blame. She knew, or ought to have known, that a Vessel going down the River had a right to run down on the north shore, and that in the position in which she was the appearance to her of the red light of a Vessel on that side of the mid-channel was no indication that the Vessel was in the act of crossing the River; and yet, there being nothing else to justify the belief, she acts at once upon her hasty and erroneous conclusion and so occasions the collision. Even supposing the *Carbon* to have excusably mistaken the course of the *Velocity*, how can she recover unless she shew that the *Velocity* was in fault?

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Their Lordships (as already observed) are unable to discover that any degree of blame can be attributed to the *Velocity*, either by her having pursued a course which she was not at liberty to pursue, or having been handled in any way which the course down the north shore did not prescribe.

They will, therefore, recommend to Her Majesty to reverse the decree appealed from, to dismiss the Appellants from the suit, and to condemn the Respondents in the costs in the Court below, and also in the costs of this appeal.

Solicitors for the Appellants: *Cattarns & Jehu.*
Solicitors for the Respondents: *Dykes & Stokes.*

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JOHN MARTIN . . . . . APPELLANT;

AND

THE REV. ALEXANDER HERIOT MACKONOCHIE . . . . . } RESPONDENT.

IN A CAUSE AND APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Monition—Motion to enforce—Pleadings in the Ecclesiastical Court.

Motion to enforce obedience to a Monition to carry into effect an Order in Council, which, among other things, prohibited the Respondent from elevating the Cup and Paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated Elements, and from using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such lighted Candles were not wanted for the purpose of giving light.

It appeared, that the elevation of the Cup and Paten for which the Respondent had been articled and complained of in the Court below, was an elevation above his head, which was the only mode of elevation pleaded in the Article, after it had been reformed, to have been practised by him, and was, therefore, that prohibited by the Sentence of the Court below, which Sentence had been affirmed on appeal, but that the Respondent had substituted for such, an elevation only to the level of his head: their Lordships were, therefore, of opinion, though disapproving and discountenancing any elevation of the Elements whatever, that, in the state of the pleadings, the illegality of the elevation since practised by the Respondent not being raised, he had tech-

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* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK, LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, AND SIR JOSEPH NAPIER, BART.

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nically complied with the terms of the original Sentence and Order, and could not be held to have disobeyed the Monition in that respect.

That with regard to the kneeling, it was proved by the evidence, as well as the admission of the Respondent, that he did prostrate and bow his knee at the times alleged, in such a manner as to be unable himself to say, whether he touched the ground with his knee, or to make it possible for any one to see, whether he was kneeling or not; and that such prostration was, in their Lordships' opinion, literally kneeling, and alike contrary to the Rubric and to the letter and spirit of the Monition.

That respecting the lighted Candles, it appeared, that the Candles on the Communion Table, though lighted and burning during the whole service before the celebration of the Holy Communion, and until the commencement thereof, were then extinguished. Their Lordships were, therefore, unable to hold, that there had not been a literal compliance with the strict terms of the Monition; though the charge made by the motion, and established by the evidence, was, as in part contained in the original Order, for using Candles on the Communion Table at times when they were not wanted for the purpose of giving light.

Under the circumstances, their Lordships expressed their opinion, that the Monition had been disobeyed with reference to the kneeling during the prayer of Consecration, and monished the Respondent to abstain therefrom for the future: and to mark their disapprobation of his course of proceeding, ordered him to pay the costs of the motion.

The principles laid down in the case of *Martin* v. *Mackonochie* (1) referred to and confirmed.

THIS was an application to the Judicial Committee for an Order to enforce compliance with a Monition issued to carry into effect the Order made by Her Majesty in Council in the above Cause and Appeal (2).

By that Order the Respondent was, in accordance with the decree of the Court below, admonished to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion, and from the use of incense, and from mixing water with the wine during the administration of the Holy Communion, and also further, from kneeling or prostrating himself before the consecrated Elements during the Prayer of Consecration, and from using lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light.

The appeal was from a Sentence or Decree of the Official Principal of the Arches Court of *Canterbury*, in a cause promoted by the Appellant against the Respondent, for having offended against

(1) Law Rep. 2 P. C. 365. (2) Ibid. 392.

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the Laws Ecclesiastical in the several matters specified and contained in the aforesaid Order (1).

The Official Principal of the Arches Court pronounced, that the Respondent had offended against the Statutes, Laws, Constitutions, and Canons Ecclesiastical by the elevation of the Cup and Paten during the administration of the Holy Communion, as also by the use of incense, and by the mixing water with wine during the administration of the Holy Communion, and Monished him to abstain from such practices for the future; but omitted or declined to pronounce, that the Respondent had so offended, by having knelt or prostrated himself before the consecrated Elements during the Prayer of Consecration, and having permitted and sanctioned such kneeling or prostrating by other Clerks in Holy Orders; or by having used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not required for the purpose of giving light, and by having permitted and sanctioned such use of lighted Candles. The appeal to Her Majesty in Council had reference, therefore, only to the kneeling or prostrating before the Consecrated Elements, and the use of lighted Candles.

The appeal was heard before the Judicial Committee, and judgment pronounced on the 23rd of December, 1868, when the Lords of the Committee agreed to report their opinion in favour of the appeal, that the decree of the Court below ought to be amended to the extent thereinafter mentioned, that the principal Cause ought to be retained, and that thereon, in addition to the matter in which the Respondent was, in the Decree appealed from, pronounced to have offended, and from which he was thereby monished to abstain for the future, he ought to be admonished to abstain from kneeling or prostrating himself before the consecrated Elements during the Prayer of Consecration; and from using lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light.

Their Lordships' report was confirmed, and an Order in Council, in the form and to the effect hereinbefore stated, made thereon (2),

(1) These charges are enumerated in the report of the case of *Martin* v. *Mackonochie*, Law Rep. 2 P. C. 367.

(2) Law Rep. 2 P. C. 392.

and a Monition in the terms of such Order, under the seal of Her Majesty's Court of Appeal, was duly issued and served on the Respondent, admonishing him to abstain for the future from the several practices therein specified and prohibited.

It appeared that, notwithstanding this Order and Monition the Respondent refused to comply therewith, and to a great extent continued the practices he was Monished to abstain from; that he continued to elevate the Cup and Paten, to kneel or prostrate himself before the consecrated Elements, and to use lighted Candles on the Communion Table when they were not wanted for the purpose of giving light. A Petition was therefore presented to the Judicial Committee, and a case lodged, stating the facts above detailed, and praying their Lordships to enforce the Monition in such manner as to them might seem meet, that right and justice might effectually be done in the premises, and that the Respondent might be condemned in costs.

The Petition was supported by affidavits in which the arrangements of the Respondent's Church, and his manner of proceeding in conducting the Services, was described and deposed to, as witnessed on two several occasions when the Deponents attended Divine Service there, as follows:—

"That during the whole of the Morning Prayer and Communion Service, there were seven lamps suspended from the ceiling of the Church, over the Chancel, each lamp containing a coloured light, which lights were burning during the whole of the Morning Prayer and Communion Service: that at the commencement of the Morning Prayer there were eight lighted Candles upon a shelf, about six inches above the level of the Communion Table, and which appeared to form part thereof, two of such Candles being in Candlesticks and six in two Candelabra, holding three Candles each, such Candlesticks and Candelabra standing upon the said shelf: that such eight Candles were extinguished immediately before the commencement of the Communion Service, up to which time they were kept continuously burning: that neither such lamps nor such Candles were required for the purpose of giving light.

"That when the Respondent, in celebrating the Communion Service, came to that part of the Prayer of Consecration at which the Rubric directs the Priest to take the Paten into his hands, he

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paused in reading the said Prayer; and that during such pause, and before taking the Paten into his hands, he bowed himself down to the Communion Table, so that his forehead nearly touched the same; he then stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table: that after kneeling for a few seconds, he rose, and again stood up and took the Paten into his hands and raised it level with his head: that he then replaced the Paten upon the Communion Table: that he then again bowed down to the Communion Table, so that his forehead nearly touched the same; he then again stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table: that after kneeling for a few seconds he again arose, stood up and proceeded with the said Prayer of Consecration until he came to that part at which the Rubric directs the Priest to take the Cup into his hands; he then again paused in reading the said Prayer: that during such pause, and before taking the Cup into his hands, he bowed himself down to the Communion Table, so that his forehead nearly touched the same; he then stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table: that after kneeling for a few seconds, he again rose and stood up, and took the Cup into his hands and raised it level with his head; he then replaced the Cup upon the Communion Table; he then again bowed down to the Communion Table, so that his forehead nearly touched the same: he then rose and stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table: that after kneeling for a few seconds he again rose, stood up, and proceeded with the Prayer of Consecration: that in handing the Cup to the assistant Priest, he knelt down facing the Priest, and bowed himself down very low, the assistant Priest at the same time holding up the Cup as high as he could reach; and the same was repeated when the assistant Priest returned the Cup to the Celebrant, after the Communicants had partaken: and that such pauses, bowings, and kneeling on the part of the Respondent were designed and intentional, and were not accidental or caused by any infirmity."

The Respondent refused to appear to the Monition, or to put in any answer to the case lodged against him, a copy of which was served on him with notice of the motion intended: but being

present in Court when the Motion was being made, and inquired for by the Court, he appeared, as he asserted, under protest, but nevertheless asked time to answer the affidavits in support of the Motion, which was afforded him.

He accordingly filed two affidavits made by himself, and one by Mr. *Walker*, one of his Curates. In his own affidavit, he in no material respect contradicted the statements made in the affidavits in support of the Motion, but in reply to the description of the mode in which he conducted the services, he stated: "That the manner of elevation of the Cup and Paten at the Church of *St. Alban's* during the Consecration Prayer and the Service for the Administration of the Holy Communion adopted and sanctioned by him, had invariably been one and the same since he discontinued the elevation above the head, and was the same as that of which Sir *Robert Phillimore*, in his judgment in this case in the Court of Arches, said, 'his present practice is not complained of;'" and he added: "I did not, on either of the days or times mentioned in the affidavits on which this Motion is founded, nor have I ever since the service of the said Monition on me, prostrated myself, or knelt on steps leading to the Communion Table, or elsewhere, when celebrating the Holy Communion, during any part of the Consecration Prayer. I admit," he continued, "that it is my practice during the Prayer of Consecration, when celebrating Holy Communion, and whilst standing before the Holy Table, reverently to bend one knee at certain parts of the said Prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating Priest, I am, of course, unable to say." The further affidavit put in by the Respondent stated, that ever since the Monition of the Court in the above Cause was served upon him, he had endeavoured to obey it; and had never intentionally or advisedly in any respect disobeyed it, or sanctioned any practices contrary to the provisions of that Monition.

The affidavit of his Curate, Mr. *Walker*, deposed to the same effect as to the manner of elevating the Paten and Cup, and

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expressly stated that "the Respondent did not prostrate himself or kneel upon the steps leading to the Communion Table, or elsewhere, at any time during the Prayer of Consecration" on the days mentioned in the affidavits of the Appellant's witnesses, and to the best of his, the Deponent's, belief he, the Respondent, did not touch the ground with either of his knees at all during that time on the occasions on which the Respondent was accused of doing so, adding that "having regard to the positions of the celebrating and assisting Priests during the Consecration Prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the Church to say whether the Respondent did kneel or not."

The motion came on for final hearing on these affidavits.

Mr. *A. J. Stephens*, Q.C., Mr. *Archibald*, and Mr. *Droop*, with him, for the Appellant:—

Moved for a Monition to enforce obedience from the Respondent to the original Monition, on the facts disclosed in the case and affidavits, and insisted that, as regarded the several matters therein stated and deposed to, the Respondent was shewn to have failed, both in substance and effect, to comply with Her Majesty's Order founded on the judgment and report of the Judicial Committee, and the Monition issued thereon. They examined the charges *seriatim*, and contended that the elevation of the Cup and Paten during the Prayer of Consecration, as prohibited by the judgment of the Dean of the Arches and Order in Council, was abundantly proved by the depositions; that the kneeling or prostrating before the consecrated Elements was in direct violation of the Monition, and was in all respects such a kneeling and such a prostration as was complained of in the original suit, and was expressly condemned by the judgment of the Judicial Committee, and prohibited by the Monition. That with regard to the use of lighted Candles, they maintained, that they were used when not required to give light, and that the continuing them on the Communion Table until the celebration of the Holy Communion, and then extinguishing them, was a mere evasion of the Monition, and neither a compliance with the letter or the spirit of the Order in Council, which the Respondent was bound, and ought to be compelled, in all respects to obey.

The Respondent in person

Relied on his own and Mr. *Walker's* affidavit. He denied that his acts of reverence during the celebration of the Holy Communion were contrary to the Monition; that the elevation of the Consecrated Elements was not an elevation above his head, as pleaded in the original Article, but only such as he adopted during the trial of the cause in the Court below, and which he maintained was consistent with, and sanctioned by, the judgment of the learned Judge of the Arches. He maintained that the extinguishing the lights on the Communion Table was in strict conformity, and a literal compliance, with the Order and Monition; and with regard to the allegation of kneeling and prostrating himself, he relied on the explanation given by him in his affidavit, and the fact that the bowing the knee, or touching the ground only with one knee, which he might accidentally do, was not kneeling or prostration in any real or grammatical sense, or so described in the Dictionaries and Literary authorities to which he referred.

THE LORD CHANCELLOR:—

In this case a motion has been made calling upon their Lordships to take proceedings in order to enforce the Monition which has been served upon the Reverend Respondent with regard to the execution of a Sentence pronounced in the first instance by the Court of Arches. This Sentence was in some degree extended and modified by the judgment which this Committee was called upon to pronounce, or, rather, by the decision which they were called upon, after argument, to recommend as fit to be made by an Order of Her Majesty in Council.

The Order provided for several matters; as to three of which only, it is now alleged, that there has been a breach by the Respondent of the Monition issued in pursuance of the Order. Those three matters are:—First, that he continues to elevate the Cup and Paten during the administration of the Holy Communion; secondly, that he continues to kneel or prostrate himself before the consecrated Elements during the Prayer of Consecration; and, thirdly, that he continues to use lighted Candles on the Communion Table at times when such lighted Candles are not wanted for the purpose of giving light.

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In order to see how far that which is complained of has been a breach of the Monition, we must, of course, in the first instance, look to the Monition itself. The Monition having recited, that the Respondent was pronounced to have offended against the Statutes, Laws, Constitutions, and Canons of the Church of *England*, by having knelt or prostrated himself before the consecrated Elements during the Prayer of Consecration, and, also, by having within the said Church elevated the Cup and Paten during the Holy Communion, and also by having used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of light, proceeds to direct him to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the Elements during the Prayer of Consecration, and also from using in the said Church lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such Candles are not wanted for the purpose of giving light.

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The evidence which is before their Lordships is addressed to these three several heads. We will deal with them in a different order from that in which they appear in the Prayer of the application, and take the use of lighted Candles on the Communion Table at times when such Candles are not wanted for the purpose of giving light, in the first instance, because with reference to that part of the case it appears to their Lordships that the affidavits do not make out the offence charged. In the first place, it appears that the offence charged is not in strict conformity with the Monition, because the Monition is itself confined to using those Candles on the Communion Table during the celebration of the Holy Communion; and the charge which is made in the motion now before this Committee is, that they were used on the Communion Table at times when they were not wanted for the purpose of giving light, leaving out the words "during the time of Holy Communion."

Of course it is not competent for their Lordships to proceed beyond the actual Monition which has been served upon the Respondent. It is that which he is said to have disobeyed, and it is

to disobedience of the Monition only that their Lordships can address themselves.

It is plain upon the affidavits that the Candles have not been lighted during the Holy Communion, for the course taken by the Respondent has been this, that the Candles are lighted as he says they always have been, and were at the time of the proceedings herein being taken, and are kept burning up to the period of the Holy Communion, and then immediately before the commencement of the Holy Communion they are extinguished.

There is no doubt, therefore, in this case of a literal compliance with the terms of the Monition. The Candles are not lighted during the period of the Holy Communion. They are lighted, indeed, when there is no necessity for their being lighted for the purpose of giving light, but they are extinguished before the Holy Communion; therefore, the compliance with the terms of the Monition has been literal and complete, and not, in that sense, evasive, for the Respondent was limited to a particular time in reference to the Candles; and whatever one may feel as to the course of the Reverend Respondent, looking to the spirit of the Monition, of course the Monition could not go beyond the matters that were charged: the offence charged was one which he has abstained from; and in this respect, therefore, their Lordships are clear that the prayer of this Motion cannot be complied with.

The next charge is, that he continues to elevate the Cup and Paten during the administration of the Holy Communion; and with reference to this matter their Lordships feel that the case is placed in a position that is eminently unsatisfactory. On the former occasion the Sentence of the Judge in the Court below was approved of with reference to this particular subject matter; therefore that Sentence is the Sentence to which recourse must be had by their Lordships when interpreting the Monition, which cannot, of course, proceed further than the sentence itself. The Sentence in the Court below was thus worded:—The Respondent was ordered "to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion, and also from the use of incense and from the mixing of water with the wine during the administration of the Holy Communion, as pleaded in the Articles."

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Their Lordships think that the words "as pleaded in the Articles" must be applied to those several offences which were charged in the passage just quoted, namely, the elevation of the Cup and Paten, also the use of incense, and the mixing of water with wine; and their Lordships are thrown back, therefore, to the Articles to see what it was that was there pleaded, and they find this state of circumstances:—Originally the third Article (1) pleaded that there was an elevation of the Cup and Paten beyond what was necessary for the purpose of complying with the terms of the Rubric, which directs that at a particular part of the Prayer of Consecration, when the sacred Elements are dealt with, the Paten shall be taken into the hands, and at another part that the Cup shall be taken into the hand or hands (for there is some little variation in the two parts of the Rubric itself) of the officiating Minister. That would have been, as it appears to all their Lordships, a charge which would have raised a distinct and definite issue, whether the elevation of the Paten or the elevation of the Cup were or were not a *bonâ fide* raising it so far only as is necessary for anything to be raised, that is, to be taken from the Table, or whether or not there was some ulterior purpose, that is to say, an act of elevation wholly distinct from, and going beyond what was necessary, for the mere purpose of taking the Paten and Cup into the hands of the officiating Minister.

But the words "and otherwise" were also inserted in the same third Article in a part which rendered it very difficult to attach any definite sense to them. Those words are so vague that the learned Judge before whom the case first came, Dr. *Lushington*, conceived that he could not admit the Article in that form, and that the words introduced such a degree of vagueness as to render it improper to call upon the Respondent to answer the charge in its then shape, and, therefore, the learned Judge said that the Article must be reformed.

(1) This Article as originally pleaded, is to be found in the Report of the case in the Law Journal, vol. xxxvi. (N.S.) Eccles. p. 25; as reformed, in the Report of the case in the Arches Court, Law Rep. 2 A. & E. 118, and Law Rep. 2 P. C. 377–8, and the judgment expressed thereon, in Law Rep. 2 A & E. 246. The Order in Council made on the appeal and retention of the principal Cause is set out in the Report of the appeal, Law Rep. 2 P. C. 392; the Monition was in the terms of the last-mentioned Order.

In the reforming of that Article those who reformed it appear to have gone beyond anything that was required by the decision of the learned Judge in the course of the argument upon the admission of the Articles. They not merely struck out these words, "and otherwise," but they also materially varied the language by describing definitely in the reformed Article the act which had been performed, namely, that it was an elevation of the Elements "above the head of the Respondent."

The Article then became confined to that particular mode of elevation, instead of being a charge of elevation beyond what was necessary for the proper compliance with the Rubric; and, therefore, when the sentence of the Judge, which directs that he shall abstain for the future from the elevation "as pleaded in the Articles," is considered, it appears to their Lordships that they are necessarily confined to that particular charge which is there contained, and that particular mode of elevation which is there complained of.

We have been thus particular in going through all the circumstances of this case, which is left, as it appears to their Lordships, in a very unsatisfactory position, because it is most desirable, and their Lordships are all of opinion, that it should be distinctly understood, that they give no sanction whatever to a notion that any elevation whatever of the Elements, as distinguished from the mere act of removing them from the Table, and taking them into the hand of the Minister, is sanctioned by law. It is not necessary for their Lordships to say more (but most undoubtedly less we cannot say) than that we feel nothing has taken place in the course of this cause that can possibly justify a conclusion that any elevation whatever, as distinguished from the raising from the Table, is proper or is sanctioned. All that their Lordships can say upon the present occasion is, that the point has never yet been in these proceedings raised, that a particular and definite mode of elevation only has been averred and complained of, and with that particular and definite mode of elevation we have nothing further to do, because it is conceded on all sides that such particular mode has been departed from.

It is not for us to say how far the letter to which the Respondent himself has referred, and in a part of which he says that the

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simple compliance with the Rubric, namely, taking the Cup and the Paten into his hands, would be sufficient for the purpose of satisfying a certain portion of his Parishioners as regards the elevation of the Elements, may or may not have misled the Judges who had this case before them.

They held, that the matter complained of having been discontinued, had in effect not been complained of, that is, by the Articles, and we have felt it to be right and proper to say thus much; nothing, therefore, which we are now determining can be pleaded hereafter as a justification for any mode of elevation which is to be distinguished from the mere act of removing the Elements from the Table, and taking them into the hands of the Minister.

Inasmuch, then, as the Reverend Respondent has said upon oath, and it is not now contravened, that his course of procedure has only been that which he says he adopted at the time of the first hearing of the matter, owing to the complaint made of the higher elevation pleaded in the Articles, their Lordships think they cannot in that state of circumstances say that he has thereby committed a breach of the Monition which has been served upon him.

The third matter which has been complained of is as follows; and as to this matter their Lordships think the case is open to very different considerations:—

The Respondent was admonished "not to kneel or prostrate himself before the consecrated Elements during the prayer of Consecration;" and without going through the affidavits, the exact state of circumstances may be taken to be as they appear upon the affidavits made by the Respondent himself and by Mr. *Walker*, the Gentleman who was present on the several occasions referred to in the motion. The affidavits in support of the motion stated distinctly acts of prostration and of kneeling during the period of the Prayer of Consecration. Into the details of those affidavits it is unnecessary to enter, because in the affidavit of the Respondent there is this, which seems to set the case in a very clear light as far as the facts are concerned. The Respondent says: "I did not on either of the days or times mentioned in the affidavits on which this motion is founded, nor have I ever since the service of the said Monition on me, prostrated myself or knelt on steps leading

to the Communion Table, or elsewhere, when celebrating the Holy Communion during any part of the Consecration Prayer. I admit that it is my practice during the Prayer of Consecration when celebrating Holy Communion,"—the time, therefore, is exactly fixed to which the Monition would apply,—"and whilst standing before the Holy Table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating Priest, I am, of course, unable to say." Mr. *Walker* is a little bolder upon that point, because he says this (he was present on these days): "that the Respondent did not prostrate himself or kneel upon the steps leading to the Communion Table, or elsewhere, at any time during the Prayer of Consecration on the 18th day of July and the 14th day of November, 1869, as mentioned in the said affidavits; and to the best of my belief he did not touch the ground with either of his knees at all during that time on the occasions on which the Respondent is accused of doing so." Then he further says this: "And having regard to the positions of the celebrating and assisting Priests during the Consecration Prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the Church to say whether the Respondent did kneel or not."

Therefore, the case as stated is this, Mr. *Mackonochie* being enjoined against kneeling during this prayer, admits a gesture which he contends is not kneeling, but he admits a bowing of his knee, a bowing of it to an extent which occasions it at times momentarily to touch the ground, a bowing of it to an extent which renders it impossible (according to Mr. *Walker's* affidavit) for anybody to see whether he is or is not kneeling—that is the distinct statement in the affidavits, viz., that nobody could see whether he is kneeling or not.

First of all their Lordships would consider the literal question which is before them, whether there has been even a literal compliance with the Monition in this act of Mr. *Mackonochie*. Their Lordships are all of opinion, that there has not been even a literal

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compliance; that Mr. *Mackonochie* has knelt; and that bowing the knee in the manner which he has described is kneeling; and that it is not necessary that a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Of course there may be such a bowing of the knee as would not amount to kneeling in the sense of the Monition, but Mr. *Mackonochie* very properly says, that he takes no advantage of any suggestion of that sort—there may be an accidental bowing of the knee, arising from fatigue or otherwise; but here is a knee bent for the purpose of reverence, and in such a manner that those who behold cannot tell whether or not what Mr. *Mackonochie* and Mr. *Walker* call kneeling, that is, touching the ground with the knee, has been arrived at, and indeed Mr. *Mackonochie* says that at certain times his knee has momentarily touched the ground. This seems to their Lordships to be literally kneeling.

But the case must be put much higher than that, because neither this Tribunal nor any Tribunal will suffer its Orders to be tampered with by mere evasion; and a mere evasion it would be, to allow a person when ordered not to kneel (the whole gist and purport of the Order, as I shall presently shew, being the kneeling by way of reverence) to say, "I did all that I could do towards so kneeling; I bowed my knee; I nearly touched the ground with it—I did not quite touch the ground, but I did it in such a manner that all my congregation, all who were attending and seeing that which I did, could not possibly tell whether I were kneeling in that sense or not." It would be intolerable to allow any Order to be trifled with in such a manner as must be implied, if their Lordships were to give place for a moment to any such argument on the part of Mr. *Mackonochie*, as that this was a compliance with the Order.

Now, with reference to this particular matter of kneeling, it is one, undoubtedly, of very great importance as regards the judgment which has been pronounced, and the occasion of that judgment. We cannot do better, with reference to this part of the subject, than call attention to the purport and intent of the Book of Common Prayer, when prescribing what is to be done, and in omitting to prescribe that which it does not intend to be done. For that purpose I will refer to the judgment which was pronounced by Lord *Cairns*, as the judgment of the Judicial Com-

mittee, on the former occasion. His Lordship thus expresses himself in that judgment (1): "Their Lordships are of opinion, that it is not open to a Minister of the Church, or even to their Lordships in advising Her Majesty as the highest Ecclesiastical Tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which appear to be trivial. The object of a *Statute of Uniformity* is, as its preamble expresses, to produce 'an universal agreement in the public worship of Almighty God,'—an object which would be wholly frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, or add to, or alter any of those details." The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell*, and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted'" (2). And then upon this very subject matter His Lordship further proceeds to say: (3) "There would, indeed, be no difficulty in shewing that the posture of the celebrating Minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book, at and after the Reformation. The various stages of the service are, as has already been shewn, fenced and guarded by directions of the most exact kind, as to standing and kneeling—the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe, that whereas in the first Prayer Book of King *Edward* VI., there was contained at the end a Rubric in these words:—'As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left, as every man's devotion serveth, without blame,'—this Rubric was in the second Prayer Book of *Edward* VI., and in all the subsequent Prayer Books, omitted."

(1) Law Rep. 2 P. C. 382.

(2) Special Report of the cases of *Westerton* v. *Liddell*, and *Beal* v. *Liddell*, by E. F. Moore. 8vo. London, 1857, p. 187.

(3) Law Rep. 2 P. C. 383.

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We may further add an observation as to the extreme care which is taken in the Prayer Book to guard all persons who might feel a scruple with reference to kneeling at the reception of the Holy Communion, from any inference that might thereby be raised in their minds of a nature contrary to that which was intended by the Prayer Book itself to be expressed, namely, any intention of adoration of the Holy Elements. This is most particularly and carefully guarded against, and the reason for such kneeling is explained, and said to be, "for a signification of our humble and grateful acknowledgment of the benefits of Christ therein given to all worthy Receivers, and for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue." Then it is explained :—"Yet, lest the same kneeling should by any persons, either out of ignorance and infirmity, or out of malice and obstinacy, be misconstrued and depraved; It is hereby declared, That thereby no adoration is intended, or ought to be done, either unto the Sacramental Bread or Wine there bodily received, or unto any Corporal presence of Christ's natural Flesh and Blood. For the Sacramental Bread and Wine remain still in their very natural substances, and therefore may not be adored; (for that were Idolatry, to be abhorred of all faithful Christians.)" (1)

And again, carefully does our Church provide in her 28th Article against any such adoration as we have spoken of by this declaration :—"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

Now, that being so, and it being of the utmost importance that, for the purposes of Common Prayer, such union should be preserved as is essential to the happiness and comfort of all who are joining in this most Holy Ordinance; what can be a greater offence than the offence of either by addition or omission occasioning trouble or confusion in the minds of those who are invited to join in Common Prayer, and in one common act of reverence? Acts of reverence, where necessary, are enjoined; and the use of additional acts of reverence, where they are not enjoined, is, according to the judgment which has been pronounced in this very matter, a thing prohibited.

If, therefore, the Reverend Respondent, in performing his own

(1) Declaration at the end of the Service of the Holy Communion.

special act of reverence, does it in such a manner, that no one can tell whether he is not doing the very thing which he is prohibited from doing, and has performed that special act of reverence at a time when there is no direction in the Book of Common Prayer for that performance, he certainly does that which militates, in every possible view of the case, both in letter and spirit, against the Monition which he has received, and the reasoning which occasioned that Monition to be issued.

Whether or not Mr. *Mackonochie* can reconcile it with his view of what is right, that a judgment of this kind should be so narrowly scrutinized, that every possible limit should be placed upon it, and that notwithstanding the reasons which are assigned for it, namely, the desire of promoting uniformity in common worship, it should be, as far as possible, evaded, it is not for their Lordships to say. There may be some who feel great grief and sorrow at any act which may appear to be at variance with the common charity and love that should induce us at all times when assembled for worship, and most especially this highest and holiest act of worship, to be as far as possible of one mind, so that then at least our unity be not disturbed.

But what one is justified in saying, as regards the act which is now complained of, as a breach of the Monition, is this, that it is not possible, happily, to reconcile with the administration of our law in its narrowest sense, any mere evasion of that which the law sanctions, of that which the law has ordered, by an authority which binds this Reverend Gentleman, as it binds every subject of the realm, to strict obedience. That obedience may be rendered grudgingly, if so it must be; it may be rendered in a manner which I am sure the Reverend Gentleman would not tolerate on the part of any of his flock, if it were a question of obedience to a Higher Power; it may be rendered, therefore, strictly within the limits which are exactly prescribed by the Monition, but that Monition may not be evaded. A mere literal compliance is not all that even the law requires; the compliance must not be literal in a sense which is but evasive.

I will not, in the name of their Lordships, say more upon what I confess presses upon me individually very strongly, the narrowness of obedience shewn by the course taken, as to keeping the

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Candles lighted until the very moment when they are forbidden, and then extinguishing them, and as to the elevation of the Elements to something which, even on the affidavits themselves, appears to me to be more than necessary for simply taking the Cup and Paten into the hands of the officiating Clergyman, since we have been obliged to hold that these acts were, nevertheless, in literal compliance with the Monition having reference to the Articles.

But here, in this matter of the kneeling, their Lordships find that there is, first, not even a literal compliance with the Order; and secondly, if, upon any strained interpretation of the word "kneeling" (for strained as it appears to their Lordships it would be), they could arrive at the conclusion, that it did not preclude the act of bowing one knee so low that it must at times touch the ground, and in a manner which cannot possibly be distinguished from kneeling by those who witness the act; still, if it was a representation of the forbidden act, as nearly as the party charged dared to represent it, and in such a guise as to convey to all at a distance the impression that the act of kneeling was really performed, that would be a species of evasion of the Order which a Court of Justice would find it right, and due to the maintenance of its own force and vigour, to visit as being itself a breach of the Order which had been made.

For these reasons it has seemed to their Lordships (and it is the opinion of us all) that there has been a clear breach of this Monition.

Their Lordships next take into consideration what is proper and right to be done. They did not hear Mr. *Stephens* upon the question as to whether or not this Tribunal has the means of enforcing its Orders. Happily it has been supplied (and I say "happily," because it would be in vain to establish a Tribunal which has no power to enforce its Orders) with abundant means for that purpose by the Statutes which have been passed in that behalf; but into the examination of those means, and the different modes that might be adopted for that purpose, we are not, for the reason I am presently going to mention, about to enter. In declining to take any more severe step than that of compelling Mr. *Mackonochie* to pay the costs of this application, their Lordships

have had to consider the affidavit which was last made by him, and to which they have been desirous to give the most favourable construction and allowance; and in that affidavit Mr. *Mackonochie* very properly says, that he never intentionally or advisedly, in any respect, disobeyed the Monition, or sanctioned any practice contrary to its provisions. I confess I think, as I have already intimated, that Mr. *Mackonochie* takes an extremely narrow view of that which the word "obedience" ordinarily implies, when he says that he has endeavoured to obey this Order, but he does say that, which in a sense, for the purpose of clearing his contempt, he may have a right to claim the benefit of, that he never intentionally or advisedly, in any respect, disobeyed the Monition.

He now, we hope, will learn that mere literal compliance in a merely evasive manner will not suffice. Literal compliance with regard to the actual limits of the Order is, of course, all that he is held to in law; for an obedience to the spirit of the Order we can only trust to his own feelings and his own conscience. And when he thus tells us, that it has not been, and is not his desire wilfully to disobey the law, or to disregard its Monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the Order, to allow Mr. *Mackonochie* the benefit of that affidavit; and they do not think it necessary on the present occasion to do more, after expressing their opinion judicially that the Monition has been disobeyed with reference to kneeling during the Prayer of Consecration, than to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application.

Their Lordships make no further Order.

The following Monition was drawn up and issued in pursuance of their Lordships' judgment:—

"The Lords of the Committee having heard *Alexander Heriot Mackonochie*, the Respondent, in person, and Counsel on behalf of the Appellant, pronounced that he, the said *Alexander Heriot Mackonochie*, had not obeyed the Monition which had been served upon him, and whereby he was, amongst other things, commanded to abstain for the future from kneeling before the consecrated

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Elements during the Prayer of Consecration; monished him to abstain therefrom for the future, and condemned him in the costs of these proceedings."

Proctors for the Appellant: *Moore & Currey.*

J. C.* 1869 Dec. 10, 11.

M. R. CURRIE & CO. . . . . APPELLANTS;

AND

THE BOMBAY NATIVE INSURANCE CO. RESPONDENTS.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Policies of Insurance on cargo and disbursements—Wreck—Notice of abandonment as for total loss—Possible recovery of the cargo, effect of, on Policies.

Suit brought to recover the amount of two Policies of Insurance upon the cargo and disbursements respectively of a Ship; both Policies being for a total loss. The Ship having become a wreck, the Captain, without taking any steps to save or discharge the cargo, deeming such impracticable, proceeded to dismantle the Ship, and gave notice to the Insurers of abandonment of the cargo, and sold both Ship and cargo by public auction. A large part of the cargo was afterwards saved. The Court below held, that as the cargo might have been, and was, in fact, partially saved, there was no such total loss of the cargo and freight as entitled the Assured to recover on either of the Policies. Such ruling, as regarded the cargo, affirmed, but as the Ship when she was reduced to a wreck, was incapable of earning any freight, the Judicial Committee were of opinion, that there was such a total loss of the disbursements, to be paid out of the freight, as to entitle the Assurers to recover on that Policy.

The authority of *Parmeter* v. *Todhunter* (1), with respect to the form of notice of abandonment, observed upon and questioned.

THIS was a suit brought in the Court of the Recorder of *Rangoon* by the Appellants, Merchants at *Moulmein*, against the Respondents, to recover the several sums of Rs. 38,400 and Rs. 1,600, as for a total loss, upon two Policies of Insurance effected by them with the Respondents upon the cargo, and disbursements respectively, of the Ship *Northland*, upon a voyage from *Moulmein* to *Madras*. The Policies were against total loss only.

The material facts were, in substance, as follows:—A cargo of

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

(1) 1 Camp. 541.

Teak, Padouk, Saul, Peema, and other Timber, was loaded on board the *Northland* at *Moulmein*, and on the 2nd of June, 1867, she set sail on her voyage with such cargo on board. The Appellants had also made large disbursements on the Ship, her stores, and other matters within the meaning of the Policy. The *Northland*, in charge of a Pilot, started on her voyage from *Moulmein* in tow of a Steamer, and proceeded in tow on the same day to a place called *Halfway Creek*, where she anchored on account of the state of the tide. About half-an-hour afterwards she was found to be driving, and a second anchor was let go, which brought her up; however, as the tide fell, she grounded. The Master and crew endeavoured, but unsuccessfully, to get her off. On the following morning the Vessel was found to have sustained considerable damage, and the deck, butt end, water ways, &c., were started, and the copper was torn and injured. The Captain remained with the Vessel until the 4th of June, endeavouring to save her, when he returned to *Moulmein* with the Passengers who were on board, and on his arrival noted his protest, and informed Mr. *Stanley*, a partner in the firm of the Appellants, that the Ship had grounded; he also applied for assistance and for cargo boats to save what he could. On the evening of the 5th the Captain returned to the Ship, taking back with him Surveyors, who surveyed the Ship, and recommended him to strip her and save what he could, which he proceeded to do, and this continued until the 10th; on which day the Captain came up to *Moulmein* again, and on the 11th had an interview with *Nanabhoy Burjorjee*, the Agent of the Respondents, and made a communication to him which was relied upon as a notice of abandonment of the cargo and disbursements. A further survey was then held upon the Ship and cargo, and the Captain determined to sell both Ship and cargo, considering it the best thing for all concerned; and on the 15th of June the Ship and cargo was sold in one lot for Rs. 13,300. The cargo was, in fact, substantially uninjured, as well as a large quantity of stores and other articles upon which the disbursements had been expended. The cargo and the stores and other articles existed in specie, and, if unshipped, might have been forwarded to their destination.

Under those circumstances, the Respondents in the Court below contended, that they were not liable under the Policies, and the Recorder of *Rangoon* (*L. P. Delves Broughton*, Esq.), by his judg-

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ment, dated the 23rd of March, 1868, held that there was not a total loss, actual or constructive, of the cargo and disbursements, or either of them, within the terms of the Policies, and dismissed the suit with costs.

The appeal was from this judgment.

Sir *R. Palmer*, Q.C., and Mr. *Grantham*, for the Appellant:—

There was such a total loss, absolute or constructive, in this case, as warranted the abandonment of the Ship and cargo, and the sale of both by the Captain: *Smith's* Mer. Law, pp. 383, 385 [7th Ed.]; *Roux* v. *Salvador* (1). It is impossible to read the evidence in the cause without arriving at the conclusion that the sale of the Ship and cargo was the best course for the Captain to take. Such a state of things constituted a constructive total loss, if it was not itself a total loss: *Arnould* on Marine Insurance, p. 851 [3rd Ed.]; *Read* v. *Bonham* (2); and that justified the sale, and rendered the Insurers liable: *Farnworth* v. *Hyde* (3); *Rosetto* v. *Gurney* (4). The notice given of abandonment was within a reasonable time, and, under the circumstances, sufficient: *Gernon* v. *The Royal Exchange Assurance Co.* (5); *King* v. *Walker* (6).

The *Solicitor-General* (Sir *John D. Coleridge*), and Mr. *Watkin Williams*, for the Respondents:—

The Policies were for a total loss only, and no such total loss, either absolute or constructive, was proved. There was no period at which some portion, at least, of the cargo might not have been saved, and forwarded to its destination. As the cargo was not a perishable cargo, the notice of abandonment, if notice it was, was insufficient and premature: *Arnould* on Marine Insurance, p. 858 [3rd Ed.]; *Davy* v. *Milford* (7); *Moss* v. *Smith* (8); *Anderson* v. *Wallis* (9); *Reimer* v. *Ringrose* (10); *Knight* v. *Faith* (11); *Fleming*

(1) 3 Bing. N. C. 266; Tudor's Leading Cases on Mer. & Marit. Law, 157, *et seq.* [2nd Ed.]
(2) 3 Br. & B. 147.
(3) Law Rep. 2 C. P. 204.
(4) 11 C. B. 176.
(5) 6 Taunt. 383.
(6) 3 H. & C. 209.
(7) 15 East, 559.
(8) 9 C. B. 94.
(9) 2 M. & S. 240.
(10) 6 Ex. 263.
(11) 15 Q. B. 649.

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v. *Smith* (1); *Parmeter* v. *Todhunter* (2). The Policy for disbursements is on the same footing as that for the cargo, they must both stand or fall together. The Captain had no more right to abandon the possibility of earning freight than he had to abandon the cargo, which was not of a perishable character. He could have hired another Vessel and forwarded the timber to its destination: *Hall* v. *Janson* (3); *Flint* v. *Flemyng* (4); *Shipton* v. *Thornton* (5).

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The consideration of the judgment was reserved, and now delivered by

LORD CHELMSFORD:—

This is an appeal from the judgment of the Recorder of *Rangoon* dismissing the suit of the Appellants brought to recover the amount of two Policies of Insurance effected by them with the Respondents upon the "cargo" and "disbursements" respectively of the ship *Northland*, upon a voyage from *Moulmein* to *Madras*.

The Policies, which were dated the 1st of June, 1867, were against total loss only.

The *Northland*, with a cargo, consisting partly of Teak and partly of Padouk, and other timber (of great specific gravity), set sail from *Moulmein*, on the insured voyage to *Madras*, on the 2nd of June, 1867. She proceeded in charge of a Pilot down the *Moulmein* River, in tow of a tug Steamer, and came to an anchor about half-past five in the evening of that day.

In consequence of the strength of the tide the *Northland* dragged her anchors, and went aground about nine o'clock. Endeavours were made during the night to get her off, but without success; and in the morning, the tide having left her, she was found (in the language of the Pilot and the Captain) "broken," or "almost broken in two." And the Captain added, "if there had been any means by which she could then have been got into deep water, she would most probably have gone down."

The Captain procured a survey of the Ship, and on the 6th of June three Surveyors reported that they found her lying ashore on the sands perfectly upright, but hogged to the extent of four

(1) 1 H. L. C. 513.
(2) 1 Camp. 541.
(3) 4 E. & B. 500.
(4) 1 B & Ad. 45.
(5) 9 A. & El. 314.

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feet; and after describing particularly other injuries which she had sustained, they concluded their report in these terms: "In consequence of the Vessel being loaded with a cargo of Padouk and Teak timber, we would recommend that she be stripped and dismantled with all despatch, and steps taken to save as much of the cargo and stores as possible, for the benefit of all concerned." The Underwriters had a survey made on their behalf by a Mr. *Peche*, upon whose evidence in other respects their Lordships are not disposed to lay any stress, but upon this occasion he substantially agreed with the other Surveyors, and reported as follows: "Her hull is so seriously injured that I recommend prompt and decisive steps be taken to dismantle and discharge for the benefit of all interested."

The Captain, in accordance with the recommendation of the Surveyors, proceeded to dismantle the Vessel, and "sent down spars and sails, and everything above water which they could move." This work of dismantling continued until the 10th of June, the day on which a notice of abandonment was given, but nothing was done or attempted towards discharging the cargo, which, according to the evidence of Mr. *Dodd*, one of the Surveyors, by employing extra hands, might have gone on simultaneously with the work of dismantling the Vessel. The grounds on which the Captain thought it would be useless to attempt to get out the cargo were stated by him to be that, "at the time the Vessel was aground the weather was nasty and squally up to the 10th or 11th of June; that at that time of the year bad and heavy weather is to be expected, that he did'nt think he could have got out a single log of the cargo without destroying the Ship by cutting her open. That if the ports (meaning the openings through which the timber was shipped, and under ordinary circumstances would have been taken out of the Vessel) had been opened she would have filled with sand: and that if he had attempted to get at the cargo by cutting the Ship, with the weather such as it was at the time, he didn't think he should have saved any of the Ship or cargo." There is some contradictory evidence as to the state of the weather between the 6th and the 10th or 11th of June. The Pilot, without specifying the exact time to which he was speaking, said, "The weather was very dirty, blowing hard with rain. There was a heavy sea on

at high water. At low water it was smooth enough." The notarial protest made by the Captain, however, does not state that there was any stormy weather between the time of the Vessel grounding and the 10th or 11th of June. His description of the weather on each day is, "Thursday, 6th June, commenced with light cloudy weather, and variable winds." He gives no account of the state of weather on the 7th of June. The 8th of June he describes as "squally weather and rain." But on Sunday, the 9th of June, this is his description: "Throughout these twenty-four hours fine clear weather and moderate breeze from S.W." On Monday, the 10th of June, he states it to have been "fine all day, clear weather, and very hot." And on Tuesday, the 11th of June, that the "first and middle part was fine clear weather, and very hot, with fine S.W. breeze." This protest of the Captain tends strongly to confirm the evidence of the witness *Bodeker*, who is the Agent of the Respondent, and who swore that "there had been unusually fine weather for some time before the second survey."

With respect to the reason given by the Captain for not making any effort to save the cargo, that none of it could be got out without cutting the Ship open, this was not the opinion of the Surveyors at the time of the first survey, but, on the contrary, they recommend "steps to be taken to save as much of the cargo as possible." And at the trial, Mr. *Dodd*, the Government Surveyor, said, "On the second occasion on which I visited the Ship I did not think it was possible to save the cargo without cutting the Ship." And, "When I saw the *Northland* first I think she could have partly discharged her cargo and come up to *Moulmein*." Another of the Surveyors, Mr. *Carruthers*, said, "It was on the second survey that I came to the conclusion that the cargo could not be got out except by cutting the Ship's decks."

Before this second survey was made, and while it was the opinion of the Surveyors that steps ought to be taken to save the cargo, the assured, the Appellants, on the 10th of June, 1867, wrote to the Underwriters in these terms: "With regard to the *Northland*, we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements."

On the following day, the 11th of June, another survey took

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place by the same three Surveyors who had made the former one, and they reported as follows: "The Ship is hogged to a fearful extent, and broken amidship, the water flowing and ebbing in and out and through her as the tide rises and falls, and the bow ports under water at high tide. We are of opinion, it would be impossible to save the Cargo, which consists of Padouk and Teak, without cutting the Ship's decks and beams, on account of the logs of timber being so severely jammed, which is caused by the Vessel being so fearfully hogged and out of shape."

After this second survey the Captain, on the 14th of June, advertised for sale by public auction the wreck of the British Ship *Northland*, together with her cargo of timber, in one lot, and on the following day the Ship and cargo were sold for the sum of Rs. 13,300. The Purchasers, immediately after the sale, proceeded to discharge the timber, and succeeded in obtaining all of it except sixty logs. There were two timber ports at the side and one on the deck. These were opened, and the timber was got up through the hatchway and out of the ports, but the greater part was lifted through the hatchway. The person employed by the Purchasers to discharge the cargo stated in his evidence, that the Vessel remained in the same position all the time they were discharging, and that they found no difficulty whatever in getting it out. They worked for thirty-five days uninterruptedly, but on the thirty-sixth day there was a strong wind, and the Vessel became a wreck, and thereupon they ceased working and left her. Under ordinary circumstances the cargo could have been discharged in twenty-one days. Upon this evidence the Recorder was of opinion, that there was no total loss, actual or constructive, within the terms of either of the two Policies, and that even if the assured had a right to abandon, there was no sufficient notice of abandonment.

Upon the argument before their Lordships, the Solicitor-General, for the Respondents, very properly admitted that the notice of abandonment was in its terms sufficient. The case upon which the Recorder founded his judgment of the insufficiency of the notice was a *Nisi Prius* case of *Parmeter* v. *Todhunter* (1), in which there having been a verbal notice that the Ship insured had been captured, recaptured, and carried into *Grenada*, and that the Under-

(1) 1 Camp. 541.

writers were required to settle as for a total loss, and to give directions as to the disposition of the Ship and cargo, Lord *Ellenborough* said "the abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." But whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word "abandon;" any equivalent expressions which informed the Underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient.

There can be no doubt that the Letter of the 10th of June from the Assured to the Underwriters was a sufficient intimation of the intention of the Assured to divest themselves of the property in the *Northland*, and to vest it in the Underwriters, subject, of course, to the question of their right to abandon, upon the ground of either an actual or a constructive total loss.

The Respondents confined their answer to the Appellant's case to the denial of there having been a total loss of the cargo, and to the objection that if there were a total loss the notice of abandonment was not given within a reasonable time.

What is a reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the Assured is not to delay his notice when a total loss occurs, in order to keep his chance of doing better for himself by keeping the subject insured, and then, when he finds it will be more to his advantage to do so, throwing the burden upon the Underwriters; while, on the other, the Underwriters cannot complain of a suspense of judgment fairly exercised on the part of the Assured, to enable him to determine whether the circumstances are such as entitle him to abandon.

In the present case, assuming the loss to be a total one, there appears to have been no unreasonable delay in giving the notice of abandonment. At the time of the first survey on the 6th of June, there was no reason for supposing that the timber would be totally lost. The Surveyors at this time recommended steps to be taken which they must have supposed would have been effectual to save some, at least, of the cargo. But at the time when the

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notice was given (as sufficiently appears by the Surveyors' report of the following day), things had assumed a much more serious appearance, so as to justify the apprehension that the cargo would be entirely lost. Whether the Vessel was brought into the condition described in the second survey, suddenly, or gradually between the 6th and the 10th of June, is not in evidence; but in either case their Lordships think, that there was no unreasonable delay in giving the notice of abandonment, and that, supposing there was a total loss of the subject insured, it would entitle the Appellant to recover the amount of the Policies.

We arrive, then, at the question, whether there was a total loss under the Policies. And here we must distinguish between the Policy on the timber and that upon the disbursements, as different considerations are applicable to them. Taking first the Policy on the timber, does the evidence shew that the assured were entitled to treat the case as one of total loss? It cannot be contended, that at the time of the first survey the timber, or at all events some part of it, could not have been saved; and if part might have been saved, the loss, of course, could only be partial. The Surveyors were all of opinion, that endeavours should be made to get the timber out of the Ship, and at the first survey they did not think it would have been necessary to cut the decks to effect this object. It was the duty of the Assured, or of the Captain of the *Northland* (to whom everything appears to have been left), to take some steps in accordance with the recommendation of the Surveyors to try and save the cargo. But towards this object the Captain literally did nothing. As far as dismantling the Ship went, he acted upon the report of the Surveyors, and continued this particular work down to the 10th of June, but according to Mr. *Dodd* this need not have interfered with the discharge of the cargo, for although the crew could not have assisted in that service, "by employing extra hands both operations might have been conducted together."

The excuse offered by the Captain for not attempting to get out the timber, is that not only at that time of the year "bad and heavy weather" might be expected, but that the weather was actually "nasty and squally," by which he must be understood to mean that it was of such a character as to render it impracticable

to make even an attempt to get at the timber. But his evidence as to the state of the weather from the 6th to the 11th of June, both inclusive, is positively contradicted by his own Notarial Protest, to which reference has been already made.

It is impossible, therefore, to believe that the state of the weather prevented even the smallest attempt to save any portion of the timber, the weather having been, on the contrary, peculiarly favourable for that season of the year for at least making the experiment.

At the time of the second survey things had materially altered for the worse, and from what the Surveyors call "the fearful extent" to which the Vessel was hogged, the timber had become "so severely jammed," that, in their opinion, it was impossible to save it without cutting the decks. Now, assuming for the moment, that the cargo was in such a condition at this time that it might be regarded as totally lost, if previously a portion of it, at least, might have been saved by the exertions of the Captain acting for the assured, and he chose not to make the slightest attempt to save it, how can the Assured recover from the Underwriters a loss which was made total by their own negligence?

This, in itself, would be an answer to the claim of a total loss upon the Policy on the timber. But it is very doubtful, whether at the time of the second survey there really was a total loss. It is true, that it was the opinion of the Surveyors that the cargo could not be saved without cutting the Ship's decks and beams, and the Captain said, "If they had attempted to get at the cargo by cutting the Ship, with the weather they had at the time, he didn't think they would have saved any of the Ship or cargo." The Captain here again makes the state of the weather an obstacle to doing what was necessary for saving the cargo, but it has been clearly shewn that this excuse cannot avail him.

If there was nothing in the state of the weather to prevent the operation of cutting open the decks, what reason was there for not resorting to it? When a Ship and cargo are in peril of being lost, the Captain is called upon to act for the benefit of all concerned—he is not at liberty to prefer the interests of one of the parties to another. In this case, his tenderness to the Ship might have arisen from his being a part-owner uninsured; but, at all

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events, there was no reason why she should have been spared if her sacrifice were necessary to the safety of her cargo. She was a hopeless wreck, and was sold at the auction in that character and by that description.

Can it be said that the Captain was doing his duty, either to the owners of the cargo or to the Underwriters, by not opening this wreck in order to obtain access to the cargo, by the only mode in which it was supposed at this time that it could be saved? But even at the period of the second survey, if any effort had been made by the Captain to get at the cargo, some portion of it might have been saved without cutting open the decks. He states, indeed, in his evidence, that "he didn't think he could have got out a single log of the cargo without destroying the Ship, and that if the timber ports had been opened she would have filled with sand." But after the auction the purchaser, according to the evidence of the person employed by him, discharged almost the whole of the cargo through the hatchways and out of the ports, without apparently experiencing any extraordinary difficulty, except that a longer time was occupied in unloading the timber than would have been required under ordinary circumstances. Whether the timber was taken out of the hatchways without cutting open the decks is not stated. It is said that, during the thirty-six days employed on the work the weather was unusually fine, but this has been abundantly shewn to have also been the case between the first and second surveys.

Their Lordships are of opinion, that there was no time between the grounding of the *Northland* and the sale by auction at which the Assured were entitled to treat the cargo as having been totally lost. They have already adverted to the absence of even the smallest attempt on the part of the Captain after the first survey to save the cargo, and to the extreme probability that with the favourable weather which occurred afterwards and before the Ship was hogged to such an extent as that the timber became "severely jammed," a considerable portion of it might have been obtained. This omission of the Captain to take any steps towards saving the cargo, at a time when it was probable that his endeavours would be successful, in their Lordships' judgment, precludes the Assured from claiming for a total loss of the cargo into whatever condition

it might have been brought afterwards. But even at the time of the second survey, as the *Northland* had then become a perfect wreck, there was no reason for sparing her, and if the timber could not be got out without cutting up the decks, their Lordships think that the Captain, who is bound where there is danger of loss of Ship and cargo to act for the benefit of all concerned, ought to have treated the Ship as utterly lost, and to have regarded only the interests of the Owners of the cargo, and of the Underwriters. As far, therefore, as the judgment of the Recorder applies to the policy upon the cargo, their Lordships are of opinion, that he came to a right conclusion that the Assured were not entitled to recover.

With respect to the Policy on disbursements, their Lordships cannot agree with the Recorder's judgment. The disbursements were advances made by the Charterer to the Captain of the *Northland*, to be paid out of freight which would not be earned except by the arrival of the Vessel at *Madras*. There can be no doubt, upon the authority of the case of *The Karnak* (1), decided by the Judicial Committee on the 15th of July last, that the sums borrowed by the Captain from the Charterer at the port of loading, to be repaid by deductions from the freight, must be considered as advances of freight, and that the Charterer had, therefore, an insurable interest. The possibility of freight being earned by the *Northland* was of course at an end when she was reduced to a wreck, and the case became one of total loss. It was argued on the part of the Respondents, that the Captain might have hired another Vessel and forwarded the timber to its destination, and so have earned freight out of which the disbursements might have been paid. But even supposing that the advances made upon the original freight would attach upon the freight thus acquired, the Captain is not under an absolute obligation to tranship a cargo when a Ship is disabled from pursuing the voyage insured, but may exercise his discretion upon the subject. And while the Ship was unquestionably a wreck, and utterly incapable of conveying the goods to their destination, and so earning freight, the Assured gave notice of abandonment to the Underwriters (which their Lordships have determined to be a good notice), and at this

(1) Law Rep. 2 P. C. 505.

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time there is no doubt there was a total loss of the disbursements which were to be paid out of freight.

Their Lordships, therefore, will recommend to Her Majesty, that the judgment appealed from be varied, so far as relates to the Policy on disbursements, and that it be declared, that the Appellants are entitled to recover on that Policy, with so much costs of suit as, according to the course of the Court below, they would have been entitled to if the judgment had been given for them on that Policy, and that in respect of the other Policy the judgment be affirmed, and that the cause be remitted to the Court below in order that a final decree be made in accordance with the above declaration. Their Lordships think there should be no costs of the appeal on either side.

Solicitors for the Appellants: *Upfill.*
Solicitors for the Respondents: *Uptons, Johnson, & Upton.*

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DIRK GYSBERT VAN BREDA . . . . . APPELLANT;

AND

JOHAN CONRAD SILBERBAUER . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Water-rights—Servitude by prescription—Cape of Good Hope—Roman-Dutch Law—Ordinances and Regulations of the Governor and Council, authority of.

Action by the Owner of a Mill against the Owner of lands situate above the Mill in which, or over which, part of the water that supplied the Mill arose and flowed, for diversion and subtraction of such water. The Plaintiff claimed under grants and certain Regulations and Ordinances made by the Governor and Council of the Colony of the *Cape of Good Hope*, as well as upon a right of servitude by prescription. Judgment was given, with damages, for the Plaintiff. On appeal such judgment affirmed, the Judicial Committee being of opinion that, whether the power to legislate respecting the water-rights of the lands in which the water arose, or over which it flowed, had or had not been sufficiently reserved in the original grants by the Governor and Council to the then Owners, yet that it was abundantly shewn,

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* *Present:*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

that the Legislature of the Colony had exercised authority, by Regulations and Ordinances, over the water in question, by which the derivative rights of the Plaintiff in the Court below had been regulated and declared.

Semble, that by the Roman-Dutch Law, as by the Law of *England*, the rights of the lower Proprietors would not attach upon water which flowed beyond the Defendants' land in a known and definite channel, even if it had its source within that land.

THE action in which this appeal arose was brought by the Respondent, as Plaintiff, against the Appellant and the Commissioners of the Municipality of *Cape Town*, in the *Cape of Good Hope*, as Defendants.

The action sought to recover damages, which the declaration alleged had been sustained by the Respondent by reason of the Defendants having diverted certain streams and supplies of water to which the Respondent claimed to be entitled for the purpose of his Mill. The right of the Respondent to the use and enjoyment of the water thus diverted was set forth in the declaration, and was therein alleged to be founded on two distinct grounds. First, it was claimed on the ground of a servitude by prescription imposed upon land granted in 1769, binding the owner of such land to allow the Mill to receive the surplus waters arising in or flowing through or over such land; and secondly, the Respondent claimed a right to the use of the water, under the provisions of certain Regulations and Ordinances made by the Governor and Council of the Colony having the force of law, subject to which the land of the Appellant was granted, and was held at the time of the diversion complained of. By the declaration a perpetual Interdict was prayed to restrain the Defendant from diverting the streams and supplies, or hindering them from flowing to the Respondent's Mill.

The Defendant pleaded a general denial of the facts and conclusions alleged, upon which plea issue was joined.

The facts upon which the Respondent's claims were based were as follow:—

The Respondent was the proprietor of a Corn-mill, driven by water-power, known as the Government Mill, and situate in *Table Valley, Cape Town*, and the Appellant was the owner of an estate called *Oranjezicht*, situated higher up *Table Valley* than the Respondent's Mill, and reaching up to the slope of *Table Mountain* above, and not far from the Mill, which estate was granted

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at different dates to the ancestors or predecessors in title of the Appellant by the Governor and Council of the *Cape of Good Hope*. These grants bore date respectively, the 1st of December, 1709, the 11th of December, 1744, and the 12th of January, 1751. In the year 1769 the grant was to his ancestor, *Michiel Van Breda*. On the 17th of October, 1805, the Mill was granted by the then Governor and Council of the Colony of the *Cape of Good Hope*, upon certain conditions, and for a certain price set forth in the deed of grant, to one *Johannes Jacobus Smuts*, and on the 30th of April, 1865, the Mill was purchased by the Respondent, together with *Smuts'* right, title, and interest, by virtue of the grant, and possession was taken by him on the 1st of May, 1865. By these conditions *Smuts* was bound not to use the water flowing to the Mill for any other purpose except for driving the Mill, after which he was to allow it to flow in the course it had always flowed.

At the time of this grant, and for a long time before, the Mill was worked by, and as it was alleged, was entitled to, a supply of water from various streams, which flowed to the Mill in the following manner:—The main stream upon which the Mill was situated was called the "*Platteklip stream*," and received the waters of several other streams, which formed a junction with it before it reached the Mill in question. The most important of these streams were (or were formerly) three in number, known respectively as the *Lemmetjes* or *Lemmetjes Kloof stream*, the *Verlatenbosch stream*, and a stream flowing from a spring called the *Vineyard spring*, all of which, as well as the *Platteklip*, came down from the *Table Mountain*.

It appeared that on the 1st of February, 1859, Messrs. *Prince & Co.*, who were the then proprietors of the Mill, brought an action in the Supreme Court against the Appellant, and the Commissioners of the Municipality of *Cape Town*, by intervention as co-Defendants, for the diversion of the water flowing from the *Vineyard spring*. In that action, judgment was given for the Plaintiffs, and the Defendants were ordered, by a decree of the Supreme Court, to supply the Mill with 30,000 gallons of water daily, to be conveyed by a pipe, at the expense of the Defendants, from a reservoir on the lands called *Oranjezicht*, to a point from which it might flow down as before to the Mill. The benefit of this judgment and decree was transferred to the Respondent at the time of his purchase

of the Mill. This quantity of 30,000 gallons was for a time duly supplied to the Mill; but after the Mill became the property of the Respondent, the supply was suffered to fall off. One of the claims of the Respondent in that action was for damages in respect of such diminution. The other and principal claim in the action related to the streams known as the *Lemmetjes* and *Verlatenbosch*, which, it was alleged, the Appellant, *Dirk Gysbert Van Breda*, had, in pursuance of a certain arrangement entered into by him with the other Defendants, the Commissioners of the Municipality of *Cape Town*, turned away from the Respondent's Mill.

The history of the Regulations with respect to the use of the waters of the *Platteklip*, and of the grant of the land, was as follows:—

On the 22nd of March, 1763, at a meeting of the Governor and Council of the Colony of the *Cape of Good Hope* (having power to make laws in the form of Resolutions for the Colony), Resolutions were passed, with reference to the water coming down from *Table Mountain*, and the use of the same by the proprietors of certain gardens lying along its course, whereby the use of such water was appropriated amongst the proprietors as therein mentioned.

These Regulations applied, amongst others, to the *Lemmetjes* and *Verlatenbosch* streams, which arose in or flowed through the land, which was the property of the Government of the Colony and was unappropriated.

On the 22nd of August, 1769, the last-mentioned land was, by an instrument of that date, granted by the Governor and Council of the Colony to the Appellant's ancestor, *Michiel Van Breda*, subject, as expressed in the terms of the grant, "to all such impositions and rights (*impositien en geregtigheden*) as are already or hereafter may be imposed by the Honourable Company on lands of that kind for the public welfare." On the 1st of March, 1774, further Regulations with reference to the water coming down from *Table Mountain*, including the *Lemmetjes* and *Verlatenbosch* streams, were, after the reading of a report on the best means of supplying the Government Mill with water, made by the Governor and Council of the Colony, whereby, amongst other things, it was ordered, that *Michiel Van Breda* should in the use of the water arising upon and flowing through or over the land granted in 1769, be restricted to three hours in the morning and evening, from four

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to seven o'clock, and should at other times let the water run alongside his garden and downwards to the Mill, and similar restrictions as to time were imposed upon all other persons entitled to use the said water in its course to the Mill.

Further Regulations and Ordinances with reference to the same waters were made, on the 3rd of April, 1787, by the Governor and Council, whereby the times during which the several persons (including *Michiel Van Breda*) who were entitled to use the same in its course to the Mill were altered, and power was given to use the same for eight hours continuously, namely, from four o'clock in the morning until noon, instead of in the mornings and evenings, as provided by the Regulations of 1774, all such persons being bound as before to let the water pass freely to the said Mill at all other times.

On the 20th of November, 1787, *Pieter Van Breda*, the son of *Michiel Van Breda*, who had succeeded his father as owner of the land, and was the ancestor of the Appellant, presented a memorial to the Governor and Council on the subject of these last-mentioned Regulations, wherein, after complaining that his property was injuriously affected by the Regulations, and relying on certain considerations in connection with the public services and position of his Father, he requested the Court to release him from the obligation of a strict compliance with the terms of the Regulations, and offered in return to allow the water to flow without obstruction freely through his garden to the main ditch to the Mill, not only from the Saturday afternoon till the Sunday afternoon for the refreshment of the Canals of *Cape Town*, but also to allow the same during every night that it may be disposed of for general use, except when he should be compelled in particular cases, in order to avoid considerable loss, to make use thereof for himself; all water flowing from the land must necessarily pass the Mill on its way to the Canals. Accordingly, on the same 20th of November, 1787, a Resolution was passed by the Governor and Council to release him from the obligation to obey the Regulations made on the 3rd of April, 1787, and to accept the offer made by him in his Memorial, trusting, that considering the inconvenience that otherwise might arise in the dry season from the absence of that water, he would carefully comply with his offer. The water referred to in the Regulations and Resolutions, and in the memorial of *Pieter Van Breda*,

included the water of the streams known as the *Lemmetjes* and *Verlatenbosch*.

Witnesses were called on behalf both of the Respondent and the Appellant, and were examined as to the course of the streams, and the damage sustained by the Respondent, and on the 8th of September, 1866, judgment was given by a majority of the Supreme Court in favour of the Respondent on every point, awarding him £50 damages, and ordering that the water in question should be allowed to flow down to the Mill without obstruction in the manner particularly mentioned in such judgment.

The Judges in favour of the Respondent were Mr. Justice *Cloete* and Mr. Justice *Watermeyer*. The Chief Justice, Sir *William Hodges, dissentiente*. Mr. Justice *Bell* was absent from the Colony.

The appeal was from this judgment and a subsequent Order of the 15th of November, 1866, made in pursuance thereof, regulating the flow of the water.

The Commissioners for the Municipality of the *Cape of Good Hope* did not join in the appeal.

The Solicitor-General (Sir *John D. Coleridge*), and Mr. *Butt*, Q.C., for the Appellant:—

The question at issue is the right to the servitude of certain water arising in or flowing through the lands belonging to the Appellant. Those lands are comprised in grants by the Dutch Government in the *Cape of Good Hope*, made to the ancestors of the Appellant, or their predecessors in title, from the year 1709 to 1769. These several grants are all anterior in date to the grant of the Mill by the Government to *Smuts* in 1805, long, therefore, before the date of the sale and transfer of it to the Respondent in 1865. Now, it is to be observed, that in no one of these grants is there any mention or reservation of water-rights. In each the lands are granted "subject to all such impositions and rights as are already, or may hereafter be, imposed by the Honourable Company"—that is, the Governor and Council—"on lands of that kind for the public welfare." Independently of prescriptive right or of the Government water regulations, the Appellant had a right to use and appropriate the water of these streams. The reservation is restricted to impositions for public purposes. There is no pretence for saying,

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that they include a servitude either of the water arising on the lands, or on that flowing through or over them: *Grotius*, on Roman-Dutch Law, B. II. ch. xxxv. secs. 14 and 15. It was the opinion of the Chief Justice, and we maintain its correctness, that there was no evidence to shew such a continuous use of the water arising on the land granted in 1769, as can found any claim of a prescriptive nature. He says the law of the Colony is quite clear, that whatever may be the case as to water running over lands, the rights of the freeholder to water rising from springs on his land is undisputed and indisputable; and he refers to passages in *Voet* which will be found in *Lib.* VIII., *tit.* III., n. 6 and 7, and *Lib.* XXXIX., *tit.* III., "*De aqua*," &c., n. 1, 2, and 3. The doctrine as to the partnership or joint ownership of water flowing over another's land is stated by *Pothier*, *Traité du Contrat de Société*, *Tom.* IV., pl. 8; *Phear* on Right of Water, p. 18. The Government water regulations cannot oblige the Appellant to allow the streams either of the *Lemmetjes* or *Verlatenbosch*, in which they have no prescriptive right, to flow down to the Respondent's Mills in the manner claimed. If any right to the water running through the Appellant's land exists, it is in the Governor and Council, and not in the Respondent, and has never been dealt with by the Government. The Respondent has no title to the water claimed: *Liggins* v. *Inge* (1); *Bealey* v. *Shaw* (2); *Wright* v. *Howard* (3).

Sir *George Honyman*, Q.C., and Mr. *Archibald*, for the Respondent:—

The rights of the parties are governed by the Regulations known in the Colony as the Government water regulations. Regulations of the Governor and Council are equivalent to an Act of Parliament here, and form the Statute Law of the Colony. The Regulation of 1763 was anterior to the grant in 1769 to the Appellant's ancestor: at the date of that grant all the water rising in or flowing through or over the land thereby granted, had been disposed of and appropriated by the previous Regulations of the Governor and Council in the manner provided by such Regulations, the grant was, therefore, subject to such Regulations. The Appellant's right to the water was by prescription, as well as by virtue of the Regulations; not by force of the grant of 1769, which con-

(1) 7 Bing. 682. (2) 6 East, 207. (3) 1 S. & S. 190.

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veyed no right of water. Whatever right the Appellant or his predecessors in title possess is derived from the Regulations of 1774, modified by the subsequent Regulations of 1787, which are binding on the Appellant, as they are part of the law of the Colony. The right which the Council has exercised by Regulations is founded on the law of servitude, as laid down in the Institutes of *Justinian, Lib.* II., *tit.* III., *de servitutibus*, and is defined in *Gale* on Easements, ch. 6. sect. 1; *Mason* v. *Hill* (1); *Broadbent* v. *Ramsbotham* (2); *Dudden* v. *Guardians of the Clutton Union* (3); *Chasemore* v. *Richards* (4); and authorities the recited. But even if the Regulations of the Council are not, as we insist they are, binding as a legislative provision, they constituted a contract with *Peter Van Breda*, which is binding on the Appellant, and to the benefit of which the Respondent, as Assignee of the Government, is entitled. Moreover, the deed of grant to *Smuts*, inasmuch as it refers to and imposes conditions on the use of the water working the Mill, amounts to a constructive grant of such water.

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Their Lordships' judgment having been postponed, was now delivered by

SIR JAMES W. COLVILE:—

The Appellant in this case is the owner of an estate situate in the *Table Valley*, near *Cape Town*, called *Oranjezicht*. It consists of various parcels of lands, which were granted to his ancestor whilst the Colony belonged to the Dutch, by several instruments, of which the most modern, as well as the one most material to the present controversy, is that of the 22nd of August, 1769.

The Respondent is the owner of a Water-mill lower down the *Table Valley*, called *Gort Molen*, which is worked by means of a stream or water-course known as the *Platteklip*.

The substance of the complaint of the Respondent, who was the Plaintiff in the suit against the Appellant, is that the Appellant has diverted the waters of certain streams which would naturally flow, and of right ought to flow, into the bed of the *Platteklip*, and, from the point of junction with the latter stream, run down and turn the wheel of the Respondent's Mill.

(1) 5 B. & Ad. 1. (2) 11 Ex. 602. (3) 1 H. & N. 627
(4) 7 H. L. C. 349; S. C. 11 Ex. 602; 2 H. & N. 168.

3 Jur. N.S. 994; 5 Jur. N.S. 873.

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The streams so alleged to have been diverted are the *Lemmetjes stream*, the *Verlatenbosch*, which joins the *Lemmetjes*, and several streams, which, for the purposes of this appeal, it will be sufficient to treat as comprehended in the description of "the stream flowing from the *Vineyard spring*."

The declaration stated, that some of these streams take their rise from certain springs situate in the Appellant's lands, and that others of them, though not originally rising upon such lands, flowed and ran over the same.

It rested the title of the Respondent to the use of these waters —first, upon certain Regulations of the Governor and Council of the Colony, dated the 1st of March, 1774; the 3rd of April, 1787; and the 20th of November, 1787: the effect of which was, as the Respondent alleged, to bind the Owners of the Appellant's lands, after making a certain prescribed use of the water rising in or out of the lands, or running over them, to allow the remainder, being a principal part thereof, to run down to the Mill; and, secondly, upon a right of servitude by prescription.

It set up a further title to the waters of the stream flowing from the *Vineyard spring* under a judgment pronounced in a suit wherein a firm of *Prince, Collinson, & Co.*, the former proprietors of the Mill, were Plaintiffs, and the Appellant and his co-Defendants were Defendants. Whereby it was ordered and decreed, that the Plaintiffs were entitled to receive, and that they should accordingly receive, a supply of 30,000 gallons of water per diem, throughout all the periods of the year, to be conveyed by means of an adequate conduit-pipe, at the expense of the Defendants, from the main reservoir on *Oranjezicht* to the junction of the *Platteklip* ravine, and the cross cut below the vineyard of the Appellant, whence the said water might flow down the ravine to the Mill of the Respondent.

The declaration further stated, that the Appellant had entered into some arrangement with the Commissioners of the Municipality of *Cape Town*, who were also made Defendants to the suit, whereunder, by means of pipes and other contrivances, they had diverted from the bed of the *Platteklip* and the Mill aforesaid a large portion of the water which had run and proceeded from the various springs and streams aforesaid to the Mill aforesaid; and, in parti-

cular, that the water arising from the spring called the *Lemmetjes spring* had, since the 1st of May, 1865, been altogether turned away from the bed of the *Platteklip* and the Mill. It further stated, that since the 1st of May, 1865, the Defendants had wrongfully and unlawfully kept back and prevented the Respondent's Mill from receiving the 30,000 gallons of water which, by the previous decree, they were ordered to allow to pass daily to the Mill. It insisted, that even if the Appellant was entitled to use for his own lands so much of the waters of the springs and streams as the irrigation thereof might require (which the Respondent did not admit), he was not entitled to sell, as he had done, the same for purposes unconnected with the irrigation or other benefit of his own lands. And in respect of the wrongs complained of, the Respondent claimed damages; and a perpetual Interdict restraining the Defendants from diverting the water of the several streams, and an Order condemning them to restore the several streams to their original and accustomed channels.

The Commissioners for the Municipality of *Cape Town*, though Defendants in the Court below, have not joined in this appeal.

The Defendants put in issue every allegation of fact and conclusion of law contained in the declaration.

Several Orders have been made by the Court in the suit. By the first, which bears date the 2nd of March, 1866, it was ordered that the water-course of the *Verlatenbosch* and *Lemmetjes* streams be reasonably cleared of obstructions, and the water be allowed to flow every Saturday from 6 o'clock in the evening till 6 o'clock on Sunday evening, and on every other day from sunrise to sunset, for a fortnight, in order to test whether, if so allowed to flow, the water of these streams would reach the *Platteklip* water-course.

On the 8th of September, 1866, the Court gave judgment for the Respondent for the sum of £50 as damages, with costs of suit, reserving certain points as to the quantities of water to come down, to be thereafter adjudged by the Court; and on the 15th day of November, 1866, it further ordered, adjudged, and decreed that the Appellant should thenceforth allow the water in the Regulations of the 3rd of April, 1787, called the water coming down through the land granted to *Pieter Van Breda* in 1769, and also called the River-water, being the water now known

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by the name of the *Lemmetjes Kloof Stream*, with which the stream now called the *Verlatenbosch Stream* also flows, to flow down without obstruction through the ancient course to the *Platteklip* watercourse, during every night, from sunset to sunrise, and on every Saturday, from 6 o'clock P.M. to 6 o'clock P.M. on the next day, being Sunday, according to the true intent and meaning of the Regulations of the Governor and Council of the 3rd of April, 1787, modified by the offer contained in the petition of the Lieutenant *Van Breda* in 1787, and the acceptance of such offer by the Council.

The present appeal, if in terms it originally covered more, has, in the argument at the Bar, been limited to the last-stated Order. The first Order was merely an Interlocutory proceeding for the purpose of ascertaining the flow of the *Lemmetjes* and *Verlatenbosch* streams, if after their junction they were allowed to flow towards the *Platteklip*. And no question is here raised as to the propriety of what has been decided by the second Order, which relates exclusively to the stream flowing from the *Vineyard*, to the Respondent's rights in respect of that stream as they were defined by the former decree, and to the damages recoverable for the breach of that decree.

It is obvious that the third Order, which is now the sole subject of appeal, is based upon two assumptions: first, that the Regulations of the Governor and Council in the matter of this water have the force of law in the Colony; and, secondly, that upon the true construction of the particular Regulations referred to, the Appellant is under an obligation, enforceable at the suit of any person aggrieved by the non-performance of it, to allow the water in question to flow in the manner prescribed by the order.

The first of these propositions has hardly been contested. Under the Dutch Government the Governor and the Council were the sole legislative power in the Colony. That their Ordinances, including these very Water Regulations, however inartistically framed, do, unless modified or repealed by subsequent legislation, still form part of the *lex scripta* of the Colony, appears from the volume of the Statute Law recently published by the *Cape* Government. It appears from the Regulations printed in the Record, that in the exercise of their legislative power the Governor and Council did, at least from 1861, by positive Ordinance regulate

the use of the streams watering the *Table Valley*, whether arising in that valley or descending from the *Table Mountain*. Their object seems to have been to give to the upper riparian proprietors the fullest use of these streams for irrigation which was compatible with the rights and interests of those below, and in particular with the due supply of water to what is designated the Honourable Company's Mill, being a Mill on the *Platteklip*, above the site on which the Respondent's Mill now stands. In doing this they may sometimes have restricted, and sometimes have extended, the rights which, apart from special Ordinance, those proprietors would have had under the general law. Whether their power to do this was specially reserved to them by the clause touching "*impositien en gereglgheden*" which appear to have been ordinarily inserted in their grants of land, is not a material question, for if the Ordinances have, as they are admitted to have, the force of law, they must be obeyed, though they may have derogated from the rights of individuals.

The Legislation touching the particular streams which are now in question was, so far as it need be stated, as follows:—By the Regulation of the 1st of March, 1774, made pursuant to the report of certain Members of the Council, it was ordered that "The water issuing from the *Table Mountain*, and running down through the land granted in freehold to *Van Breda* in 1769, might be led out of its course, or otherwise impeded, for the gardens of the said *Breda*, himself, but also never otherwise than in the morning and evening, from 4 to 9 o'clock, and that he (*Breda*) should be obliged during the summer season to let the said River-water run first along, and then downwards, with an angle, through his gardens, into the common ditch (admitted to be the *Platteklip*) to the Mill.

In April, 1787, it was resolved, upon a further report of persons deputed to inquire into the whole subject of the water-courses in the *Table Valley*, to withdraw the order of the 1st of March, 1774, in respect of the regulated use of the water for the gardens situate in the *Table Valley*, and to substitute other provisions.

The provision relating to the waters in question was as follows:—

"The water coming down through the land granted to *Pieter van Breda* in the year 1769, for the garden of the said *Breda*, to

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be made use of daily, but for not longer than from 4 in the morning until 12 o'clock at noon; whilst the said *Breda* shall be obliged, as heretofore, to let the River-water run during the dry season, first along and then downwards with an angle, through his garden to the Mill."

On the 20th of November, 1787, the Lieutenant *Pieter Van Breda*, the ancestor of the Appellant, then in possession of *Oranjezicht*, presented a petition to the Governor and Council praying for relief against the provisions of the last-stated Ordinance. The petition, after stating certain representations made by the Petitioner's Father against the Ordinance of 1774, and that in consequence of such representations that Ordinance had never been enforced against him; and complaining of the probable effect of the Ordinance of the 3rd of April, 1787, upon his garden, contains the following passages:—

"That Memorialist feels himself thus compelled to bring his grievances again under the consideration of your Honour and Worships, in the full confidence that you will, as Memorialist humbly requests, pay a favourable regard to the same, and, acquiescing in the justice of the complaint, release him from the obligation of complying with that part of the Regulation of the 3rd of April last which deprives him of the free use of the River-water arising in his own freehold.

"That Memorialist, on the other hand, having no desire or intention to avoid the obligation of every member of society to contribute his part towards the prosperity of his fellow-men and citizens, but, on the contrary, convinced that the above River-water, after having been used by him, should necessarily answer other purposes besides his private ones, is fully ready and prepared to comply therewith, in such a manner as may be done without detriment to his lawful rights, and he hereby offers to allow the said River-water, during the dry season, to flow without obstruction freely through his garden to the main ditch, not only from Saturday afternoon till the Sunday afternoon, for the refreshment of the Canals of *Cape Town*, but also to allow the same during every night, that it may be disposed of for general use, except when the Petitioner shall be compelled, in particular cases, in order to prevent considerable loss, to make use thereof for himself.

"The Memorialist, trusting that this offer will be considered sufficient to allow a proper use of the said River-water to others, remains in the certain expectation that it will meet the approbation of your Honour and Worships, and that the said offer, saving his own lawful right, may be a means by which the Petitioner may be properly released from the altered regulations respecting the water made by the aforesaid resolution of the 3rd of April of this year."

The Ordinance of November, 1787, states this petition *in extenso*, and then proceeds as follows:—

"Whereupon it was taken into consideration that the arrangements enacted by the resolution of the 3rd of April of this year, regarding the use of the water for the gardens in this *Table Valley*, and in particular that by which the regulation for the garden of the said *Breda* is made, as merely founded on the former arrangements of 1774, apparently without considering at that time that the River-water, in regard to which the said regulation for the garden of Lieutenant *Breda* was then made, had its source in a piece of land which was granted in freehold, in the year 1769, to the former proprietor of that garden, late ex-*Burgherraad Michiel Van Breda*, and which grant was made principally as a compensation for the service which the said *Burgherraad Breda* had done shortly before to the Company and the Colony, by allowing that a very abundant and pure spring of water arising in his old land should be built on and let out for the purposes of public use, in such manner as takes place at the present time, and as it is still maintained and kept in repair: so that, because the said *Breda* had thereby been deprived of the use of the said Fountain-water, the use of which he might have retained to himself, as formerly, it must also be supposed that, in the grant of the new land in 1769, it was purposely that no condition or exception was made regarding the water rising in that new land, in order that the water might supply the loss suffered by the proprietor of that garden by the leading out of the water of the other fountain.

"And whereas, it would be contrary to fairness that the aforesaid *Breda* should be deprived of the lawful use of the above-mentioned River-water arising in his new ground, which belongs to him in the first place, it has been resolved unanimously to release him

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from the obligation to obey the regulations respecting that water, made on the 3rd of April of this year, and, on the contrary, considered that the offer made by him in the latter part of his petition may be accepted, trusting that, considering the inconvenience which otherwise might arise in the dry season from the absence of that water, he will carefully comply with his above offers.

"Resolved, consequently, to place an extract hereof in the hands of the Commissioners of the Court of Justice, in order to guide in the observance of the arrangement about the aforesaid water."

The question upon this part of the case is whether, as the Respondents contend, this last-stated document was in the nature of a law imposing upon *Van Breda* and his successors the legal obligation to allow the water to flow in the manner stated in his offer; or whether, as the Appellant contends, it simply relieved him from the obligation to obey the Regulations of the 3rd of April, 1787, leaving him free to comply with his offer or not, as he might see fit.

The question is not free from difficulty; but their Lordships have come to the conclusion, that the former is the true and reasonable construction of the document under consideration. Nothing can be more informal than the mode in which, as the other Regulations shew, the Governor and Council exercised their legislative power. Their Lordships must look to the substance of the transaction. Here was a man subject to a written law, who came forward to complain of its provisions by petition to the Legislature; and offering to do certain things "as the means whereby he may be released" from those provisions. The Legislature accepts his offer, and resolves to release him from the obligation to obey the regulation of which he complains, trusting that he will comply with his offer. Now, the Legislature could only modify an existing law by passing a new law, and therefore the document, whatever be the true construction of its terms, must be treated as an Ordinance having the force of law. And the reasonable construction of it seems to their Lordships to be, that it substitutes for the obligations which the former law had imposed upon *Van Breda* for the benefit of the public—the obligation to do that for the benefit of the public which was expressed in his offer. It may be that if he failed to perform this obligation he

would not incur the penalties which were imposed on those who disobeyed the general regulations: but the obligation was nevertheless one which any person aggrieved by its non-performance could sue to enforce. Their Lordships are fortified in this construction by the final clause, wherein it is resolved to place an extract of the proceedings "in the hands of the Commissioners of the Court of Justice, in order to guide in the observance of the arrangement about the aforesaid water."

This being their Lordships' view they deem it unnecessary to consider the various other questions raised in the argument before them. If the last Regulation had not incorporated, so to speak, the offer, and thereby defined the legal obligations, of *Van Breda* —if it had merely released him from the obligations of the first Regulation of 1787, and left him to his rights over the water under the general law, it could hardly be contended that it conferred upon him affirmatively the right to divert the water for purposes other than that of irrigation, or to sell it in violation of the rights which the lower riparian proprietors might have under the general law. The question would then arise what the latter rights are? And this is a question for the satisfactory decision whereof the record, as sent home, does not afford the requisite materials.

In the first place, there is not a sufficient *constat* whether, as a matter of fact, the *Lemmetjes* and *Verlatenbosch* do or do not rise on the Appellant's land. The balance of the evidence given in the cause seems to be in favour of the conclusion that they do so rise; and this is in some measure confirmed by the last Regulation of 1787. But two of the learned Judges below dispute this; founding their conclusions, somewhat irregularly as it appears to their Lordships, upon their personal knowledge, derived either from a personal view of the locality, had in the former Suit, or from a recollection of the evidence taken in that Suit. Again, their Lordships have not before them the particular texts in *Voet* upon which all the Judges seem to concur in holding that, if the streams do rise in the Appellant's land, he is by the law of the Colony entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Roman-Dutch Law, as by the

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Law of *England*, the rights of the lower proprietors would not attach upon water which had once flowed beyond the Appellant's land in a known and definite channel, even though it had its source within that land. Another issue of fact, disputed at their Lordships' Bar, would have arisen on this point.

Their Lordships, however, are relieved from the necessity of considering these questions, since the consequence of their construction of the Regulations is, that they must humbly recommend Her Majesty to affirm the decree under appeal with a slight modification to be now stated. That modification consists in the insertion of the words "during the dry season" between the words "henceforth" and "allow." The addition of these words will make the Order literally comply with the terms of *Van Breda's* offer in November, 1787.

The Order will then leave the Appellant free to make what use he pleases of the water (and the use actually made of it is apparently one for the benefit of the public) at seasons when it cannot be required to swell the waters of the *Platteklip*. Their Lordships, however, are of opinion, that this slight variation in the form of the decree which, is, probably, not inconsistent with the intention of the Court below, ought not to relieve the Appellant from paying the costs of this appeal.

Solicitors for the Appellant: *Venning, Robins, & Venning.*
Solicitors for the Respondent: *Nash, Field, & Layton.*

THE SOUTH AUSTRALIAN INSURANCE COMPANY . . . . . } APPELLANTS;

AND

WILLIAM BEAVIS RANDELL AND SAMUEL RANDELL . . . . . } RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF SOUTH AUSTRALIA.

Policy against fire—Bailment—Corn deposited with Miller for the general purposes of his Trade, not held to be in trust.

A bailment on trust implies that there is reserved to the Bailor the right to claim a re-delivery of the property deposited in bailment.

Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment.

Where, therefore, corn was deposited by Farmers with a Miller, to be stored and used as part of the current consumable stock or capital of the Miller's trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the Farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of any equal quantity, on the day on which he made his demand, with a small charge for general purposes:—

Held, that such a transaction amounted to a sale by the Farmer to the Miller, and was not a bailment of the corn, and entitled the Miller to claim in respect thereof upon a Policy of Insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the Policy, as "goods held in trust and on commission," upon which condition the claim was resisted by the Insurers.

THIS was an action on a Fire Policy of Insurance, in which the Respondents were Plaintiffs, and the Appellants were Defendants.

The Appellants were an Insurance Company, carrying on business in the Province of *South Australia*, and having their principal place of business at *Adelaide*, in that Province. The Respondents were Millers, carrying on business at *Blumberg*, in the same Province.

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE, SIR JOSEPH NAPIER, BART., and THE LORD JUSTICE GIFFARD.

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The facts were these:—

On the 4th of July, 1866, application was made to the Appellants by the Respondents, to insure the current stock in their Mill, namely, wheat, flour, sacks, &c., to the amount of £1,250, against loss or damage by fire, and on the same day an Insurance was effected in the terms of such application, and subject to the conditions indorsed on the Policy; one of which was that "Goods held in trust or on commission must be insured as such, otherwise the Policy will not extend to cover them."

On the 17th of February, 1867, a fire occurred, whereby the Respondents' Mill, with the stock therein, was destroyed. A claim was made by the Respondents for the loss, but the amount being disputed by the Appellants, an action was brought by them to recover the value of the stock.

The Plaintiffs declared upon the Policy, and the Defendants pleaded, that the Plaintiffs were not interested in the stock, and also that in their proposals for the insurance they represented that the stock was to be insured for themselves, whereas it was held by the Plaintiffs in trust for other persons. Issue was joined on the pleas, and the action was tried before the Chief Justice and a jury.

Upon the trial it was admitted by the Plaintiffs, that the stock which had been destroyed by the fire had been paid for by the Defendants, except such portion as the Defendants alleged was held by the Plaintiffs in trust for others; and the question was, whether such portion, consisting of wheat, was held by the Plaintiffs in trust, within the meaning of the above condition, and was therefore not covered by the Policy.

The evidence, so far as it was material to this question, shewed that according to the Plaintiffs' custom and course of business wheat was received by them from Farmers to whom such course of business and dealing was known, and on receipt, shot out of Bags in the presence of the Farmers who brought it into large hutches, where it became mixed with other wheat which had been received in a similar manner, and on part of which advances had been made to the Farmers by the Plaintiffs. The wheat thus mixed lost its identity and became the current stock of the Plaintiffs, which, according to their course of dealing, known to the

Farmers, was either sold as wheat by the Plaintiffs or ground in their Mill. The Plaintiffs could do what they liked with it. If ground, the flour produced from such stock was sold and otherwise dealt with by the Plaintiffs as they thought fit, and as their own property. It never was intended by the parties that the identical wheat delivered by the Farmers should be returned to them. On delivery of the wheat to the Plaintiffs they gave to the Farmer a receipt in these terms:—"Received, &c., to store," and it was shot to be stored or taken on storage. The Farmer could at any time demand an equal quantity of wheat of like quality with that delivered by him to the Plaintiffs, or the market price of an equal quantity, fixing the price as of the day on which he made his demand. The Plaintiffs had the option of delivering wheat of like quality or paying such market price. Advances were frequently made to the Farmers by the Plaintiffs in respect of the wheat so delivered to them. No charge was made by the Plaintiffs in respect of the wheat until after the lapse of a certain time, when the charge was one farthing per bushel per month. The wheat in question had been brought by Farmers to the Plaintiffs in manner aforesaid, and in the course of business, and had been mixed with other wheat, and treated in the manner aforesaid, and a portion of it had been paid for by the Plaintiffs. No evidence was adduced on the part of the Defendants, but their Counsel applied for a nonsuit on the ground that the wheat was held in trust, and was not the property of the Plaintiffs.

The Chief Justice declined to nonsuit the Plaintiffs, and by consent the verdict was entered for them for £698, including interest, with leave to the Defendants to move to enter a verdict for them if the Court should be of opinion, that the wheat so taken on storage was held in trust within the terms of the conditions in the Policy.

A rule *nisi* was granted calling on the Plaintiffs to shew cause why the verdict for the Plaintiffs should not be set aside and a verdict entered for the Defendants, pursuant to leave reserved, upon the following grounds:—First, that the goods stored had not been assured by the Plaintiffs; and secondly, that the wheat taken on storage was held upon trust within the terms of the conditions of the Policy.

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This rule came on to be argued before the Chief Justice and Mr. Justice *Gwynne*, when the Court was divided in opinion, Mr. Justice *Gwynne* being of opinion, that the property in the wheat when delivered was vested in the Plaintiffs beneficially, as their own property, and was not property held in trust; the Chief Justice being of the contrary opinion, and Mr. Justice *Wearing* being precluded from taking part in the judgment, the rule was discharged.

From this judgment the present appeal was brought.

Mr. *C. E. Pollock*, Q.C., and the Hon. *A. Thesiger*, for the Appellants:—

The amount of property covered by the Insurance depends on the terms of the Policy, and the evidence. The receipts given to the Farmers were "to store," and though the Respondents, as Millers, were permitted to grind and convert the corn deposited with them into flour, yet until they did so they were merely Bailees of such corn, and held the same in trust, within the exception contained in the conditions of the Policy. Goods held in trust must be so described to be included in a Policy: *Waters* v. *Monarch Fire and Life Assurance Company* (1); *The London and North Western Railway Company* v. *Glyn* (2). The right of the Respondents to grind or sell wheat taken from the bulk was an incident of the storage; and they admitted, in their correspondence and claim, that the Insurance was not made for their own protection, but for that of the Farmers, for whom they, in fact and in law, held the wheat in trust. Bailment, according to *Blackstone*, 2 Com. p. 451, is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the Bailee: 2 *Steph.* Com. p. 78 [4th Ed.]; Sir *William Jones* on Bailment, p. 64; *Story* on Bailment, § 283; *Les Termes de la Ley*, tit. "*Bailement*," p. 73. "As to borrowing a thing perishable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them, otherwise it could not supply the uses for which it was lent; and, therefore, he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed." That is the law as laid down in the "Doctor and

(1) 5 El. & Bl. 870. (2) 1 E. & E. 652.

Student," Dial, II. ch. xxxviii.; by *Muchall* [Ed. 1815]. In such a case, however, if what is borrowed is lost, although it be not by any negligence of the Borrower, as if he be robbed of it, he must make the loss good: *Coggs* v. *Bernard* (1). Then is the mixture of the corn such a confusion of goods as could vest the property of the whole in the Respondents. They were mere storers, and the mixture being by consent of the several owners, they would have an interest in common in proportion to their respective shares: 2 *Bl.* Com. p. 405. The *Commixtio*, *Confusio*, and *Specificatio* of the Civil Law differ materially from our Law. *Commixtio* is the mixing together of things not liquid, and has no effect upon the rights of the respective Owners if separation is practicable, but if not, as in this case, creates a joint ownership: *Inst. Lib.* II. *tit.* 1, pl. 28; *Mackeldey*, *Systema Juris Romani hodie usitate*, §§ 251, 252; *Mackeldey's* Mod. Civil Law, B. I., § 270, p. 285 [Ed. 1845]; 2 *Kent's* Comm. § 589 [11th Ed.]; *Jones* v. *Moore* (2); *Young* v. *Matthews* (3); *Buckley* v. *Gross* (4). "*Confusio*" likewise produces a connected whole, which, however is fluid: *Ib.* note *; while "*Specificatio*," which has no bearing in this case, is the acquisition or the ownership of a new species: *Mackeldey*, *Syst. Jur. Rom.* § 246. *Pothier* includes both "*Commixtio*" and "*Confusio*" under one head, *Tom.* IX. p. 166; *Story* on Bailments, § 283, citing *Seymour* v. *Brown* (5); *Pearce* v. *Schunch* (6); *Wadsworth* v. *Allcott* (7). Then the mixing must be either a sale or a *mutuum*, for if neither, it can only be a bailment, and the corn so in storage would be held in trust, and within the exception in the Policy. To constitute a sale there must be an intention to pass property: *Young* v. *Matthews* (3). *Pothier*, in his *Traité du Contrat de prêt de Consomption*, *Tom.* IV., *tit.* II. [Ed. 1827], discusses all the kinds of such contract, and defines and describes them as a *mutuum*.

Mr. *Mellish*, Q.C., and Mr. *Way* (of the Australian Bar), for the Respondents:—

The wheat was not held in trust within the meaning of the conditions of the Policy. The language used in the Policy was

(1) Ld. Raymond, 915.
(2) 4 Y. & C. 351–356.
(3) Law Rep. 2 C. P. 127.
(4) 3 B. & S. 566, 574.
(5) 19 Johnson (Amr.) Rep. 44.
(6) 3 Hill's New York (Amr.) Rep. 23.
(7) 2 Selden (Amr.) Rep. 64.

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not according to the meaning of the parties contracting. The contract was not one simply of deposit, but the wheat became vested in the Respondents on the delivery to them by the Farmers, and was, in fact, sold to the Respondents, the price being to be paid in kind or in money. If in money, at the market value of wheat, equal in quality, at the time of demand by the Farmers. There was no contract of bailment; the wheat deposited never could be restored, and was never intended to be. Other wheat was to be substituted, or else a money payment. Nor is there anything of a fiduciary character in the deposit of the wheat by the Farmers; it is precisely similar to the deposit of money with a Banker, the same money is never agreed or intended to be returned; in such a case there is no analogy to the relation between Principal and Factor, or Agent, who is a *quasi* Trustee for his Principal in respect of the particular matter for which he is appointed Factor or Agent: *Foley* v. *Hill* (1). It is not a *mutuum* where the identical thing lent is not to be returned, but another thing of the same kind, quality, nature, or value, as money, wine, or other things capable of being valued by number, weight, or measure: *Story's* Law of Bailment, § 47; but it is that species of bailment described by Sir *William Jones*, in his Law of Bailment, p. 64, as a loan "for use" as distinguished from a *mutuum*, which, "as the specific things are not to be returned, the absolute property of them is transferred to the borrower, who must bear the loss of them if they be destroyed by wreck, pillage, fire, or other inevitable misfortune;" and in a note by the Editor, the very article in question, namely corn, is referred to as an example of the peculiar law: *Ib.* p. 65; *Pothier, Traité du Contrat de Dépôt, Tom.* IV. *tit.* III. c. I. art. 11; *Trat. du Droit de Domaine de Propriété, Tom.* VIII. p. 2, ch. II. s. 3, art. 4. In *Spence* v. *The Union Marine Insurance Company* (2) the doctrine of "*Confusio*" and "*Commixio*" is fully considered. There is nothing in the word "storage" being used to alter the legal result of the transaction, as shewn by the evidence. But the dealing between the parties did not amount even to a *mutuum* according to the Civil Law: *Inst. Lib.* III. *tit.* XIV. The corn delivered was, while in bulk, still held in trust.

(1) 2 H. L. C. 28.

(2) Law Rep. 3 C. P. 427.

Their Lordships' judgment was pronounced by

SIR JOSEPH NAPIER :—

The question in this case is, whether the wheat that was taken in storage by the Respondents, under the circumstances stated in the Chief Justice's notes of the evidence at the trial before him, is to be considered as property held by the Respondents in trust, or whether it is correctly described in the proposal and in the Policy of Insurance as property in which the Respondents were interested for themselves? According to the case that was cited by Mr. *Thesiger* in his very able argument, the words of the Policy as to property held in trust ought not to receive a technical Chancery construction (if I may so call it); but the substantial question is, whether the Respondents were the beneficial Owners of the wheat insured, or had merely the possession as Bailees, whilst the property remained in the Farmers who delivered the wheat, so long at least as it was not actually appropriated by use or payment on the part of the Respondents?

Looking to the evidence, in order to ascertain the conditions upon which this wheat was delivered and taken in storage, we find in the evidence of *Randell* (one of the Plaintiffs) the following passage:—"At the time of the fire the whole of the wheat, excepting a few Bags—not more than twenty—was in bulk. It had been shot out of Bags into large hutches. Have been a Miller twelve years. The wheat was ours to do what we thought proper. We might grind or sell; and when any one came who had brought us wheat, we had to pay market price of equal quality." Again, the Foreman of the Plaintiffs, in his evidence, says:—"Farmer brings the wheat, and he can sell it when he pleases to the Miller. Miller can do what he likes with it, grind it or sell it. All wheat when brought was emptied at once into a storing-place in presence of Farmer who brought it."

The evidence of the only Farmer who was examined does not throw any light upon the question, but rather obscures it. The substance and effect of all the evidence that bears on this part of the case is this. When wheat was brought by the Farmer to the Miller, he delivered it to the Miller to be stored with his current stock that was used for the known purposes of his trade. It was,

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with the consent of the Farmer, put into storage with this consumable stock of the Miller; the Farmer got a storage receipt for it, and might afterwards come at any time he thought fit to claim the price of the same quantity of wheat of equal quality according to the market price of the day on which he claimed payment.

The evidence is somewhat confused and inconsistent on the surface in one or two places, but it sufficiently appears that the Farmer had the right to select his time for demanding payment for the wheat, which, with his consent, was stored at the time of delivery, as part of the current consumable stock which the Miller might grind or sell or use at his will and pleasure for his own profit.

There is no direct evidence that the Farmer had the option of claiming an equal quantity of wheat of the like quality, instead of the value in money; and from the very nature of the dealing he could not get back the identical wheat delivered, as it was mixed in the common stock with his consent.

A bailment on trust implies, that there is reserved to the Bailor the right to claim a redelivery of the property deposited in bailment. No doubt the cases that are referred to are generally cases of a bailment without a question of mixture. Mr. *Thesiger* in his argument put it as if there was some distinction in the case, in favour of the Appellants, on account of the mixture; but the facts as they appear on the evidence exclude the applicability of such a distinction. Taking the view of it most favourable to his argument, that the Farmer could claim as of right an equal quantity of the like quality, this must be without reference to any specific bulk from which it should be taken, for the stock with which he consented to allow his wheat to be mixed might all have been used for the benefit of the Miller before the claim of the Farmer would be put forward.

The law seems to be concisely and accurately stated by Sir *William Jones* in the passages cited by Mr. *Mellish* from his treatise on Bailments, pp. 64 and 102 [3rd Ed.]. Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment.

Chancellor *Kent* in his Commentaries, Vol. ii., § 589, p. 781,

[11th Ed.], where he refers to the case of *Seymour* v. *Brown*, of which he disapproves in common with Mr. Justice *Story*, adopts the test, whether the identical subject matter was to be restored either as it stood or in an altered form; or whether a different thing was to be given for it as an equivalent; for in the latter case it was a sale, and not a bailment. This is the true and settled doctrine according to his opinion. Now, the Farmers do not appear on the evidence to have contracted for more than to be paid for an equal quantity of the like quality of wheat, delivered at the market price of the day, on which a settlement should be demanded. Supposing that there was an implied option to claim an equal quantity of the like quality at any time after delivery, there could be no right of claiming an aliquot part of the identical bulk with which his wheat was mixed up at the time of delivery, for this was consumable at the will and pleasure of the Miller, as part of the current stock, liable to fluctuation, from time to time, both in quantity and quality.

Moreover, it appears to their Lordships, that there is no sound distinction, in principle, between this and the case of money deposited with a Banker on a deposit receipt. It may have been deposited in negotiable paper, in Bank-notes, or in Sovereigns, but it is paid in upon the known course and conditions of the Banker's dealings. A man is supposed to intend the natural consequence of his acts. He knows the course of dealing; he hands in the money; he gets a deposit receipt; he knows that the money is taken by the Banker to be dealt with as part of his current capital, to be used as his own for his own purposes. By the deposit, it is placed in the disposing power of the Banker; and surely he who has acquired the disposing power over property for his own benefit, without the control of another, has the beneficial ownership.

In the Banker's case in the House of Lords, the case of *Foley* v. *Hill* (1), the question was fully discussed, whether a Banker, under such circumstances, could be considered and dealt with as a Trustee; Lord *Cottenham* says, at page 36: "Money, when paid into a Bank, ceases altogether to be the money of the Principal (2); it is then the money of the Banker, who is bound to return an equiva-

(1) 2 H. L. C. 28. (2) See *Parker* v. *Marchant*, 2 Philips, 360.

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lent by paying a similar sum to that deposited with him, when he is asked for it. The money paid into the Bankers is money known by the Principal to be placed there for the purpose of being under the control of the Banker; it is then the Banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of Bankers in some places, or the principal and a small rate of interest, according to the custom of Bankers in other places. The money placed in the custody of a Banker is, to all intents and purposes, the money of the Banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the Principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it, or deal with it as the property of his Principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the Principal, when demanded, a sum equivalent to that paid into his hands."

An indelible incident of trust property is that a Trustee can never make use of it for his own benefit. An incident of property, that is in bailment, is that the Bailor may require its restoration. This right of recalling the deposit is relied on by Lord *Cottenham* (p. 39), as a test to try the principle on which the fiduciary relation was sought to be maintained. But in this case, no right seems to exist on the part of the Depositor to get back either his identical wheat, or a share of the specific bulk in which his wheat was mixed with his consent; there is no such right on the one side, while, on the other, there is the power in the Miller of doing what he liked with the wheat after it became part of his current stock. This is an inverted order of right that is wholly inconsistent with the relation of Trustee and *cestui que trust* that is contended for in this case.

Lord *Brougham*, in the case already cited, says (p. 43): "Now, as to the Banker: is his position with respect to his Customers that of a Trustee with respect to his *cestui que trust?* Is it that of a Principal with respect to an Agent, or that of a Principal with respect to a Factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the com-

mon position of a Banker, which consists of the common case of receiving money from his Customer on condition of paying it back when asked for, or when drawn upon; or of receiving money from other parties, to the credit of the Customer, upon like conditions to be drawn out by the Customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no Banker could exist, especially a Banker who pays interest. But even a Banker who does not pay interest could not possibly carry on his trade if he were to hold the money and to pay it back, as a mere depositary of the principal. But he receives it, to the knowledge of his Customer, for the express purpose of using it as his own, which, if he were a Trustee, he could not do without a breach of trust."

As to the charge for storage, it is to be observed, that it is not the storage of the wheat that was actually delivered, or of an equal quantity of the specific stock with which it was mixed up at the time of delivery, but storage for an equal quantity which is assumed to have been kept in the current stock of the Mill. It seems to be an equitable term of the final settlement, in which the Farmer has the benefit of selecting the time that is most advantageous for himself to claim payment at the market price of the day for the same quantity of like quality of wheat that he delivered.

The charge or deduction for storage of so much in quantity as was delivered may be set off against the Farmer's privilege of selecting his own time for payment at the market rate of the day. This is the more reasonable if there was an option on the part of the Miller to give the Farmer a like quantity of a like quality, because he might then be supposed to have kept a quantity in storage for the purpose of having it in his power to exercise this option; or if the Farmer had a corresponding option of claiming an equal quantity of like quality, instead of the money value. But, however this may be, it does not vary the general nature of the case any more than where deposits are made with a Banker for a given time, and he allows a small rate of interest on the money.

Putting the insurance out of view, let us see on whom would the loss fall of the stored wheat destroyed by this fire. Would it be

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any answer for the Miller to say to the Farmer when he came to claim the price of the wheat according to contract: "All this wheat has been destroyed by a fire"? The Farmer might well reply: "It was delivered to you, and at once put into your current stock, to be used as you thought fit for your own use and benefit. You acquired complete dominion over it, and you must, therefore, bear the loss." It is not upon the exercise of a dominion not subject to control, but upon having such dominion, that beneficial ownership depends. The party who has acquired such dominion over property is not bound to exercise it in any particular way or at any particular time, but the having the power to use property as his own for his own purposes is wholly irreconcilable with the notion of his being a Trustee of the property, holding it for the benefit of his *cestui que trust.*

There is a passage in "Doctor and Student" "Dial," by *Murchall*, [Ed. 1815], to which reference may here be made. It is in the second dialogue, ch. xxxviii.: "A man may have of another by way of loan or borrowing money, corn, wine, and such other things, where the same thing cannot be delivered if it be occupied, but another thing of like nature and like value must be delivered for it; and such things he that they be lent to, may by force of the loan, use as his own; and, therefore, if they perish, it is at his jeopardy." Here, by force of the contract, the Miller might use as his own the whole of the wheat that was delivered to him by the Farmers. Accordingly, the Miller would be responsible to the Farmers, notwithstanding the loss of the wheat by the fire, *Res suo perit domino.*

If, then, the property was so vested in the Respondents that they must bear the loss by the fire, if not indemnified by insurance, is not this the very case in which, on effecting an insurance, a man ought to describe the property substantially and honestly as being insured for himself and not held in trust for the benefit of another? Although afterwards there may have been some inexactness and inconsistency in the language of Mr. *Randell*, when trying to get a settlement and meeting objections that were raised by the Appellants (and we all know that such is not unusual in disputed cases), this cannot alter the legal result of the whole transaction. It depends upon ascertained facts, and we are bound here to read the

report of the evidence as reasonable men with the eyes of common sense, and to make every just inference which the statement of the evidence fairly warrants.

Their Lordships do not find anything in the Judge's notes that is not reconcilable with the Plaintiff's statement of the result of the dealings. "The wheat was ours to do what we thought proper. We might grind or sell; and when any one came who brought us wheat, we had to pay market price of equal quality." The result is, in the opinion of their Lordships, that the Farmers who delivered their wheat to the Respondents upon the terms disclosed in the evidence should not be considered afterwards to be the beneficial owners and the Respondents' bailees in trust for the Farmers.

It appears to their Lordships, that this is not the case of a possession given subject to a trust, but that it is the case of a property transferred for value, at the time of delivery, upon special terms of settlement.

What Chancellor *Kent*, § 589, p. 781 [11th Ed.], describes as "the true and settled doctrine," which had been disturbed by the case of *Seymour* v. *Brown* (1), but has been resettled by subsequent decisions, is the doctrine which is laid down with his known precision by Sir *William Jones*. It comes to this, that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes. It is a sale and not a bailment. In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common. It may perhaps be regarded, under special circumstances, as the case of persons having a common property, and if they all concur in a bailment of this property, all may require a redelivery of what they have so put in bailment. It may be that in such a case each might claim separately to have an aliquot part of the whole restored to him; but here the current stock was, from its very nature, liable to be changed from day to day, both in quantity and quality. The delivery was not for the peculiar or primary purpose of storage *simpliciter*, as in the case of a bailment of property to be returned

(1) 19 Johns. (Amr.) Rep. 44.

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to one Bailor, or of any part to one or more of several joint Bailors; but the wheat was delivered by each Farmer independently, to be stored and used as part of the current stock or capital of the Miller's trade. There seems to be no ground upon which a Banker is held not to be a Trustee, or a Banker's current capital not to be trust property, that is not applicable in principle to the case of the Miller and his current stock of wheat, which is his trading capital.

Therefore, it appears to their Lordships, that the description in the proposal and in the Policy is a correct and honest description of the subject of the insurance. As the question reserved at the trial, was, whether the wheat taken in storage should be considered as trust property, within the terms of the conditions of the Policy, and as their Lordships think, that it should not be so considered, they will humbly advise Her Majesty that the Order of the Court below, discharging the rule *nisi* to set aside the verdict, ought to be affirmed and the appeal dismissed with costs.

Solicitors for the Appellants: *Hunter, Gwatkin, & Hunter.*

Solicitors for the Respondents: *Bridges, Sawtell, Heyward, & Ram.*

JOHN MOFFATT . . . . . APPELLANT;

AND

EDWARD LA TROBE BATEMAN . . . . RESPONDENT.

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Dec. 14.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Action for personal injury—Master and Servant—Conveying Servant to place of work—Negligence.

Action for negligence by the Defendant in conveying the Plaintiff, who was a Decorator and Gardener in his service, to perform for him certain work. The Defendant drove, and while on the road the kingbolt of the carriage broke, the Horses bolted, the Carriage was overturned, and the Plaintiff injured. There was no evidence of gross neglect on the part of the Defendant:—*Held* (overruling the judgment of the Court below),

First, that in the absence of any evidence of gross negligence on the part of the Defendant the Plaintiff was not entitled to recover damages;

Secondly, that the evidence did not disclose such negligence as to render the Defendant, performing a gratuitous service for the Plaintiff, responsible.

The case of *Scott* v. *The London and St. Katharine's Docks Company* (1) distinguished.

THIS was an action brought by the Respondent to recover compensation for breach of an alleged contract by the Appellant to use proper care in conveying the Respondent in a carriage to certain places near *Melbourne*, and also for wrongful dismissal from the Appellant's service.

The first count of the declaration stated, that in consideration that the Plaintiff, at the Defendant's request, had taken a seat in a carriage of the Defendant to *Willis' Station*, for profit to the Defendant, he promised the Plaintiff to take proper care in conveying him to that Station, but he did not do so; the second count was to the same effect, but omitting the words "for profit," and stating the place to be *Ballarat*, instead of *Willis' Station*. The last count was for wrongful dismissal.

The Defendant pleaded, first, to the first and second counts, *non*

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., and The LORD JUSTICE GIFFARD.

(1) 3 H. & C. 596.

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assumpsit; secondly, same counts, that he did not become a passenger in the carriage as alleged; thirdly, a denial of the breaches; and, to the last count, pleaded fourthly, payment into Court of the sum of £233, as sufficient to satisfy the claim under that count.

The Plaintiff accepted this sum in satisfaction of such claim, and joined issue on the first three pleas.

The action was tried before one of the Judges of the Supreme Court and a jury, when the following facts were proved:—

In May, 1867, the Plaintiff, who was a Decorator and ornamental Gardener, entered into the service of the Defendant at a salary of £300 per annum. On the 13th of September in the same year the Defendant asked the Plaintiff to accompany him from his residence at *Hopkins' Hill* to *Willis' Station*, which belonged to the Defendant, and which was distant about eight miles, for the purpose of assisting in papering some rooms there for him. The Plaintiff at first objected, but afterwards consented, and thereupon the Plaintiff and Defendant started together in a Buggy drawn by two Horses, which were driven by the Defendant, who had previously driven the Plaintiff in a carriage with the same Horses. When the Plaintiff and the Defendant arrived within about a mile of *Willis' Station*, and were driving up a slight incline at a pace of under eight miles an hour, the road was crossed by two plough furrows. In crossing one of these furrows the Buggy was jolted, and the kingbolt, by which the front wheels of the carriage were attached to the hind part, broke, and the Horses went away with only the forecarriage and wheels. Both the Plaintiff and Defendant were thrown out and became insensible. The Defendant was the first to recover his consciousness, and seeing the state of the Plaintiff, immediately went to *Willis' Station*, and sent a man with a Horse and cart to take him back to *Hopkins' Hill*, with directions to send for a Doctor to attend him. For about five weeks the Plaintiff remained under medical attendance at *Hopkins' Hill*, and at the end of that period, acting under the advice of the medical man, he left for *Melbourne*. A verdict was given for the Plaintiff, with £1,500 damages on the first count, and for the Defendant on the second count, leave being reserved to the Defendant to set aside the verdict for the Plaintiff, and to enter a nonsuit.

The Appellant obtained a rule *nisi* in the Supreme Court to set aside the verdict and enter a nonsuit.

On the 4th of September, 1868, the rule came on for argument before the Chief Justice, Sir *William Foster Stawell*, and the Justices *Barry* and *Williams*, when the rule was discharged with costs, Mr. Justice *Williams* dissenting.

The Chief Justice and Mr. Justice *Barry*, in their judgment, after stating that in their opinion there was evidence of the promise laid in the first count, proceeded to consider, whether there was evidence of such negligence on the part of the Defendant as to render him answerable, and, assuming that it was not in dispute that an action might be maintained, if there was evidence to go to the jury that the Defendant had not used the care and skill he was bound to do as a bailee without profit or reward, proceeded to consider the latter of the two questions, observing that for the Plaintiff it was contended, that the propensities and temper of the Horses, the evidence of the Plaintiff as to the cause of the accident, the circumstances attendant on its occurrence, and the admissions of the Defendant, all formed a case on which a jury alone could pronounce; while the Defendant submitted, that the Plaintiff had not substantiated his own case; that it ought to have been proved by him affirmatively, not inferentially, that the fracture of the kingbolt was a mere accident against which the Defendant was not bound to provide; and that there was no proof that the Horses were not dealt with as the necessities of the case required. They observed, that the question of the amount of care and skill a gratuitous Agent or Bailee may, under different circumstances, be required to bestow had within the last few years been fully considered by the Courts at *Westminster;* and the following principles had, as they thought, been recognised, viz., that a person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care; that an unpaid Agent is bound to use such skill as it has been shewn he possesses, and is guilty of culpable negligence if he do not; that mere proof of an accident does not in all cases throw upon a Defendant the burden of shewing the real cause of the injury; there must be reasonable evidence of negligence; but that where the thing, being under the management of the Defendant the

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accident is such as in the ordinary course does not happen if those who have the management use proper care, it afforded reasonable evidence, in the absence of explanation, that the accident arose from want of care: citing the case of *Scott* v. *The London and St. Katherine's Dock Company* (1); and applying the principles there laid down, after an analysis and examination of the evidence, they were of opinion that, regarding the whole case, as well that for the Defendant as for the Plaintiff, certain facts had been proved from which inferences might legitimately be deduced that there was evidence to justify a verdict either for Plaintiff or Defendant, according as the version for the one or the other was accepted; that it was for the jury not the Court to determine which premises they would accept, and then deduce therefrom the proper inferences, or decline to draw any, and that the Judges ought neither to withdraw such a case altogether from the jury, nor, as there was evidence on both sides, disturb the conclusions at which they had arrived. The rule *nisi* was, therefore, discharged, and the record, as suggested at the trial, amended.

Mr. Justice *Williams* differed from the other Judges, and after referring to such parts of the evidence, as in his judgment, bore upon the case, came to the conclusion, that there was not sufficient evidence to shew that the accident was caused by the negligence of the Defendant; and citing *Templeman* v. *Haydon* (2), was of opinion, that the rule to enter a nonsuit ought to be made absolute.

The appeal was from this judgment.

Mr. *Manisty*, Q.C., and Mr. *Macnamara*, for the Appellant:—

There was no evidence to support the first count of the declaration, or, in fact, any evidence of a contract on the part of the Appellant. It was a gratuitous conveyance, the Appellant not carrying the Respondent for profit, and, therefore, no higher duty was imposed on the Appellant than that of a person offering another a seat in a Carriage he was driving, and who, if liable at all for an accident to the Passenger, could only be so on the ground, that he had been guilty of gross negligence, which could not be sustained in a case like the present, when the accident happened by the breaking of the kingbolt of the Buggy, for which the Appellant

(1) 3 H. & C. 596, 601 (2) 12 C. B. 507.

was not answerable. In *Redhead* v. *The Midland Railway Company* (1) it was held, that Railway Companies who undertook to carry Passengers for hire, although bound to use the utmost care, skill, and vigilance, in everything that concerns the safety of the Passengers, do not warrant the roadworthiness of the Carriages they employ, and, consequently, are not responsible for an accident to a Passenger arising from a latent defect in the wheel of one of their Carriages, such as no care or skill could detect; so *Hammack* v. *White* (2), where it was said by Chief Justice *Erle*, that the mere proof of an accident having happened to a Train does not cast upon the Defendants, the Railway Company, the burthen of shewing the real cause of the injury. In that case it appeared (3) that the Defendant bought a Horse at *Tattersall's*, and took him out to try him, when, from some unexplained cause, the Horse became restive, and, notwithstanding the Defendant's well directed efforts to control him, ran upon the pavement and killed a man, and the Court of Common Bench held, that those facts disclosed no evidence of negligence which a Judge was warranted in submitting to the jury. *Morgan* v. *Sim* (4) was a case of collision, and this Tribunal laid down the rule, that the *onus probandi* lies on a party seeking to recover compensation, and that party must establish the fact that the damage was attributable to the neglect or default of the other party, or else he cannot recover. Here the Appellant, in any view, could be only answerable for the highest class of negligence, namely, gross negligence, which requires positive and affirmative evidence: *Giblin* v. *McMullen* (5).

Mr. *Mellish*, Q.C., and Mr. *Gadsden*, for the Respondent:—

Considering the relation subsisting between the Appellant and Respondent, there was sufficient evidence to establish ordinary negligence. There was a sufficient *primâ facie* case of negligence shewn by the evidence, which, upon the authority of *Scott* v. *The London and St. Katherine's Docks Company* (6), the Respondent was bound to relieve himself of. That was an action, like this, for personal injury caused by the neglect of the Defendant, and the

(1) 9 B. & S. 519; S. C. 8 B. & S. 371.
(2) 11 C. B. (N.S.) 594.
(3) Ibid. 588.
(4) 11 Moore's P. C. Cases, 307, 312.
(5) Law Rep. 2 P. C. 317.
(6) 3 H. & C. 596.

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Exchequer Chamber held, that the Plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the case to the jury. Here the Respondent was going to *Willis' Station* on the Appellant's business, and for his benefit, and the Appellant must be taken to have contracted for a greater degree of skill and care than would have been required from a person who was driving another gratuitously. In *Clothier* v. *Webster* (1) it was held, that a public Board, though acting gratuitously for the benefit of the public, was responsible for damage resulting from the negligent performance of the duty intrusted to them. In the words of Chief Justice *Erle,* in the case of *Scott* v. *The London and St. Katherine's Docks Company* (2), "where the thing is shewn to be under the management of the Defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendants, that the accident arose from want of care," which rule, we submit, is applicable to the present case. As the question of negligence was one of fact for the jury, the finding of the jury in favour of the Respondent ought not to be disturbed: *Moore* v. *Clucas* (3).

1869 *Dec.* 15.

Judgment was reserved and delivered by

LORD CHELMSFORD:—

The question to be determined in this appeal is, whether there was any evidence to go to the jury of the Appellant having been guilty of that degree of negligence for which, under all the circumstances of the case, he was responsible?

The following are the material facts proved at the trial:—The Respondent, who is a Decorator and ornamental Gardener, had entered into an agreement with the Appellant to serve him at the rate of £300 a year for three years, in laying out his gardens at his residence at *Hopkins' Hill.* On the day of the accident, the Appellant asked the Respondent to go to a place called *Willis' Station* which belonged to the Appellant, to paper some rooms for him, and he proposed to drive him there in his Buggy. The

(1) 12 C. B. (N.S.) 790. (2) 3 H. & C. 601.
(3) 7 Moore's P. C. Cases, 352.

Respondent, in his evidence, stated that after making many objections, he consented to go; that his objections to accompany the Appellant were with reference to his mode of driving; that he made excuses, but did not like telling him what his real motive for refusing was. The Appellant, in his evidence said that the Respondent refused to accompany him to *Willis' Station* because the morning was wet. The accident happened within a mile of *Willis' Station*. The Respondent described the Buggy as old and rusty, and one that he would not have been seen in near Town, and the Horses as a very spirited pair, and he stated, that the Appellant whipped up the Horses to make them gallop, and that at the time of the accident they were going very fast, but he could not say they were galloping. When they came to a spot where there were three tracks, the Appellant took the one on the left, and the Respondent was suddenly thrown out about two yards on the left-hand side of the Buggy. When we came to himself, he found that the Horses and the fore wheels of the Buggy were gone; that there was the branch of a tree across the road, whether the whole way across he could not say, and that the hind wheels had stopped at this branch. This is the whole account which the Respondent is able to give of the accident by which he certainly received very serious injuries.

Before considering the evidence to prove negligence on the part of the Appellant, it will be proper to determine for what degree of negligence he is responsible. It is admitted that he was not carrying the Respondent for profit in the ordinary meaning of that term, but Mr. *Mellish* argued, that as the Respondent was going to *Willis' Station* on the Appellant's business, and for his benefit, he must be taken to have contracted for a greater degree of skill and care than would be required from a person who was driving another gratuitously. But their Lordships cannot adopt this view. The Respondent was not obliged to go with the Appellant, but might have found his way to *Willis' Station* in some other manner, and the case amounts to no more than this, that the Respondent having agreed to paper the rooms at the Station, the Appellant offered to drive him there, which imposed no higher duty upon him than in the case suggested during the argument, of a person offering another a seat in a Carriage which he is driving, who cer-

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tainly, if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description.

Is there, then, any evidence of the Appellant having been guilty of gross negligence—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another, responsible? There is no evidence at all of the mode in which the accident took place. It is probable that it might have been occasioned by running against the branch of the tree which is described by the Respondent as lying upon the road, but no further description is given by the Respondent of the accident, than the fact of its occurrence, and the place where it occurred.

The Counsel for the Respondent contended, that a case of *primâ facie* negligence being shewn, the Appellant was called upon to relieve himself from it, and they cited the case of *Scott* v. *The London and St. Katherine's Docks Company* (1), where it was held, that "in an action for personal injury caused by the alleged neglect of the Defendant, the Plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the case to the jury. But that where the thing is shewn to be under the management of the Defendant or his Servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care." Now, that was a case in which the negligence proved was, that the Plaintiff, who was an Officer of the Customs, whilst in the discharge of his duty, was passing in front of a Warehouse in the Dock, and six bags of sugar fell upon him. Undoubtedly in that case there was the strongest *primâ facie* presumption of negligence, because it is not in the ordinary course of things that loaded bags should fall out of a Warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and, therefore, no *primâ facie* presumption of negligence having been raised, their Lordships think that it was necessary for the Plaintiff in the case (the Respondent) to give affirmative evidence of there being

(1) 3 H. & C. 596.

gross negligence on the part of the Appellant occasioning the accident.

The Respondent endeavoured to prove this degree of negligence on the part of the Appellant by means of admissions made by the Appellant to two witnesses. The first of them, *Smith*, a Nurseryman, said, "That night" (that is the night of the accident) "or the next morning, the Defendant said, that he had to blame himself for what had occurred, that he had not examined the Vehicle, that after the accident he discovered the defective state of the kingbolt." And the same witness said, that on another occasion, on his way to *Willis' Station*, Defendant said that he never would go out with one of the Horses—that he had served him the same trick before, and had ruined the other Horse besides. This witness, on being cross-examined, said the Appellant said "the Horse had bolted before on previous occasions, that he had bolted and made the other Horse to bolt too." The other witness, *Margaretta Perry*, said, "The Defendant said it was neglect; the Buggy was not looked to. He said the kingbolt had broken." She also heard the Defendant say, that he could scarcely drive those Horses, and she added, that she had heard him tell the Boy to be ready to jump out, as he could not manage them.

With regard to the proof of negligence by the admission of the Appellant that he had not examined the Vehicle and discovered the defective state of the kingbolt, their Lordships are of opinion, that this amounts to no proof whatever of negligence. It appears that the carriage was regularly examined by a Blacksmith every three months, and it is very unlikely that the Appellant before going out for a drive or using the Buggy would examine very strictly and carefully what was its state with regard to its bolts and fastenings, or that he could fairly be accused of negligence for not having done so.

Then as to the evidence of the Appellant's admissions with respect to the Horses. Undoubtedly, if the accident had happened by reason of any of those circumstances to which the Appellant spoke in his admissions to the witnesses, if the Horses had bolted, if they had become unmanageable, if they had been too much for him, and the accident could be referred to the occurrence of any of these circumstances, there might have been a case made out against him.

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But so far from this being proved, it appears from the Respondent's evidence, who had been driven with these Horses by the Appellant before, that "On the road to *Willis' Station* he did not observe anything unusual, except the Appellant's whipping up the Horses, as he said they were sluggish. And the Respondent made no special complaint at the rate at which they were going, or of the Vehicle in which they were going, or of the Horses."

Under these circumstances, there really is no evidence whatever of negligence of any description on the part of the Appellant. The whole case against him is, that in the course of driving to the *Willis' Station* the Horses and front wheels of the Carriage separated from the hinder wheels, possibly from coming in contact with the branch of the tree; but even that is mere conjecture. But that the accident occurred from any negligence which would have rendered the Appellant liable is entirely destitute of proof.

Their Lordships are very unwilling to interfere with the judgment of the learned Judges who decided in this case that there was proof of negligence sufficient to entitle the Plaintiff to recover; but they cannot help coming to the conclusion, that the case ought to have been withdrawn from the jury at the close of the Plaintiff's case, on the ground that he had offered no evidence to establish a case of gross negligence against the Defendant.

Under these circumstances, their Lordships will recommend He Majesty to reverse the judgment. The costs will follow the usual course.

Solicitors for the Appellant: *Wedlake & Letts.*
Solicitors for the Respondent: *Tamplin & Tayler.*

THOMAS PHILIPPE LA CLOCHE AND WILLIAM GAUDIN . . . . . } APPELLANTS;

AND

THOMAS LA CLOCHE . . . . . RESPONDENT.

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Jan. 24.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Law of Jersey—Testamentary power limited to one third of Testator's moveable estate—Title and power of Executors to administer the whole estate.

By the law of *Jersey*, a Testator who dies leaving a Widow and lawful child or children cannot dispose by Will of more than one third part of his personal estate. If the Will professes to dispose of more than one third part of the moveables, it is liable to be reduced *ad legitimum modum*.

By the same law and custom, the Executors of a Testator are entitled to the possession of the whole of the moveables of a Testator for a year and a day after his decease, and their possession continues until they have received the amount of the moveable estate bequeathed by the Will, and have also fulfilled the duties of administration. But at the beginning of their office they are bound to make an inventory of the whole of the moveables, and to cite the heir for the purpose of seeing this done, unless the heir elect to pay or secure to the Executors the full amount of the bequests, debts, and expenses, in which case the heir becomes entitled to the possession.

Under the maxim "*le mort saisit le vif*," the children or heirs of a Testator are, from the moment of his death, the true Owners of that part of the moveable estate which by law belongs to them, but the law of *Jersey* makes the Executors *les procureurs légaux* of the heir, which procuration is irrevocable *jusqu'à l'accomplissement du Testament*, and in this character gives the Executors full right and title, *d'eux-mêmes*, to take possession of, recover, and receive, the whole of the moveables for the purposes of administration, subject to the right of the heir to interpose and demand possession from the Executors, by depositing with them the full amount of the debts and other charges of administration, and of the bequests made by the Will. So *held* by the Judicial Committee in a case where a Testator domiciled in *Jersey*, but having moveable estate out of the Island, by his Will bequeathed all his personal property, with the exception of a few trifling legacies, to his Grandson, to the exclusion of his only Son and heir, who claimed to be entitled by the law and custom of the Island absolutely to two thirds, and disputed the right of the Executors to recover or administer more than one third of the Testator's estate.

THIS appeal raised the question, whether the Appellants, as the Executors of the Will of *Thomas La Cloche*, a native of *St. Helier*,

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in the Island of *Jersey*, and domiciled there, were entitled to the legal seisin (*saisine légale*) of the whole of the personal estate and effects of the Testator, or whether the Respondent, *Thomas La Cloche*, as the only Son, and by the law and custom of *Jersey* the sole heir of the Testator, was entitled to the legal seisin of the whole, *pendente lite*, or of two thirds of such personal estate, to the exclusion of the Appellants, as Executors of the Will of the Testator.

The question arose under the following circumstances:—

Thomas La Cloche, by his Will in writing, bearing date the 2nd of October, 1862, after providing for payment of his debts and funeral expenses, and giving a few trifling legacies, gave and bequeathed all the rest of his personal property, of what nature or quality it might be, and in whatever place or country the same might be invested or placed on the day of his decease, to his Grandson, *Thomas Philippe La Cloche*, one of the Appellants; and he appointed the Appellants Executors of his Will.

The Testator died in the Island of *Jersey*, on the 13th of October, 1864, without having in any way altered or revoked his Will, which was proved by the Appellants in the Ecclesiastical Court of the Island of *Jersey*, on the 20th of October, 1864.

Nearly the whole of the personal estate of the Testator, amounting to upwards of £38,000, was invested at the time of his decease in Foreign securities, the scrip and other evidences of title appertaining to which were in the hands of Messrs. *Mallet Frères & Co.*, Bankers, in *Paris*, with whom the Testator had, during his lifetime, deposited them.

By the law and custom of the Island of *Jersey*, a Testator having a Wife and no children, may bequeath one-half of his personal estate, but if he has no Wife, but a child or children living at the time of his decease, he has a power of disposition by Will over one third only of his personal property, the other two thirds being vested by operation of law in such child or children.

The Respondent, *Thomas La Cloche*, was the only child of the Testator, and the Appellant, *Thomas Philippe La Cloche*, was the Son of the Respondent, *Thomas La Cloche*. The Respondent was consequently advised, that as the only Son, and, by the law and custom of *Jersey*, sole heir of the Testator, he was entitled abso-

lutely to two thirds of the personal property of the Testator his Father, and that the Testator's Will, so far as it purported to dispose of these two thirds of his personal property, was void, and that upon an action being instituted for that purpose before the Royal Court of *Jersey*, the Court would reduce the Will of the Testator *ad legitimum modum*.

Acting upon this advice, the Respondent, immediately after the Testator's decease, gave notice to Messrs. *Mallet Frères & Co.*, with whom nearly the whole of the scrip and documents relating to the personal estate of the Testator were deposited, that, as the only Son, and by the law and custom of *Jersey* principal heir of the Testator, his Father, he claimed two thirds of his personal estate and effects, and that he claimed to be entitled to the seisin of such two thirds, to the exclusion of the Executors, the Appellants, inasmuch as the Will of the Testator was, by the law of *Jersey*, invalid as regarded the disposition by the Testator of such two thirds, and he likewise gave Messrs. *Mallet Frères & Co.* further notice, that he had commenced a suit in the Royal Court of the Island of *Jersey*, to have the Will of the Testator reduced *ad legitimum modum*, and that they were not to part with any portion of the personal estate of the Testator in their hands, nor with any of the scrip or documents appertaining to the same, to the Executors named in the Will, or either of them.

In the month of October, 1864, the Respondent, as such Son and sole heir of the Testator, commenced a suit in the Royal Court of the Island of *Jersey* against all the parties interested in the Testator's Will, for the purpose of reducing it *ad legitimum modum*. The Appellants denied his title, but on the 20th of June, 1865, the inferior number of the Court declared his title as principal heir to be proved, and reduced the Will *ad legitimum modum*, and sent the parties before the *Greffier* to carry out the judgment. An account of the personal estate and effects of the Testator was accordingly made out before the *Greffier* of the Court, in accordance with the terms of the above judgment and the same divided into three lots, whereof the Respondent chose the first and second lots, and the parties were again sent before the Royal Court by the *Greffier* for the purpose of having his return confirmed. The inferior number of the Court, by its judgment of the 30th of May,

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1867, decided to postpone the further consideration of that case until a final judgment should be given in the action.

In consequence of the notice given by the Respondent to Messrs. *Mallet Frères & Co.* not to part with any portion of the personal estate of the Testator in their hands, or of the scrip or documents appertaining to the same, they refused to hand the scrip and other documents in their possession over to the Appellants, who applied for and claimed to be entitled to the same as Executors of the Will of the Testator. For the purpose of compelling Messrs. *Mallet Frères & Co.* to hand over the scrip and other documents to them, the Appellants (the suit by the Respondent to set aside his Father's Will being then pending before the Royal Court of *Jersey*) commenced an action against them before the First Chamber of the Civil Tribunal of the *Seine*, in *France*, to which the Respondent, claiming, as sole heir of the Testator his late Father, was, on his own application, made a party by that Court; and on the 24th of February, 1865, the French Court gave judgment in favour of the Appellants, and declared that as Executors they were entitled to receive all the personal estate of the Testator, and ordered Messrs. *Mallet Frères & Co.* to hand over to them all such portions thereof as might be in their hands. From this judgment the Respondent appealed to the Imperial Court of *Paris*, and on the 29th of November, 1865, the French Court of appeal reversed the decision of the Court below, and ordered Messrs. *Mallet Frères & Co.* to retain the scrip and other documents in their hands belonging to the personal estate of the Testator until further ordered, and to administer them in the meantime for the account of whoever might be ultimately declared entitled thereto.

In consequence of the judgment of the Imperial Court of *Paris*, the Appellants, on the 7th of September, 1866, commenced the action in the Royal Court of Jersey, the subject of this appeal, against the Respondent for the purpose of having it declared that they, as Executors of the Will of the Testator, were, by the law and custom of the Island of *Jersey*, entitled to the actual seisin (*la saisine légale*) of the whole of his personal estate and effects. The Respondent having taken several preliminary objections, which were decided against him, pleaded that he was the only Son and sole heir of *Thomas La Cloche*, deceased, that as such he was

entitled by law to the possession and ownership of two thirds at least of the personal estate of the deceased—a right of which the deceased had no power to deprive him—that by the rule of law "*le mort saisit le vif*," he was, in such capacity, seised from the moment of the death of the deceased of the entirety of the succession, and could not be held to disseise himself of any part of such succession until there was a definite judgment, whether a valid Will of the deceased existed or not; that the question of annulling the Will of the deceased was still pending before the Court in the action in which the Appellants, the Respondent in his capacity of sole heir of the deceased, and the residuary legatee were parties; and although the Court had decided that the Will of the deceased could not be annulled in its entirety, but ought only to be reduced *ad legitimum modum*, the question of the validity of the Will was not yet decided, the Appellants themselves having appealed from such decision; that supposing even that such judgment of the Court should be maintained on appeal, it would evidently be contrary to the principles of law that the heir should be bound to disseise himself of the portion which belonged to him of right, in order to deliver it to those who had no other rights but such as they derived from the Testator, in proportion to his testamentary powers; and the Respondent pleaded, that the question of the *saisine* of the personal estate of the deceased could not be decided until the result of the suit for annulling the Will was known; that he must remain seised of the entirety of the personal estate until completion of the suit, and that, under the supposition the most favourable to the Executors, they could be entitled to the possession of a third only of the succession.

Upon this plea the inferior number of the Royal Court gave judgment on the 13th of October, 1866, that the Appellants, as Executors of the Will of *Thomas La Cloche*, the Testator, were entitled to the seisin of the whole of the personal estate of the Testator, and that they had a preference over the principal heir to the effects, scrip, and documents belonging to the estate.

Against this decision the Respondent, *Thomas La Cloche*, appealed to the superior number of the Royal Court, and, by its judgment of the 27th of October, 1868, that Court reversed the decision of the inferior number of the 13th of October, 1866, and condemned the

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Appellants in the costs (except as to those of the rehearing), which were ordered to be paid by the parties in equal shares. Against this decision the Appellants instituted the present appeal.

At the hearing of the appeal the Appellants produced extracts of cases from the Records of the Royal Court to shew that the heir of a Testator, where such Testator appoints Executors, had not any original seisin of the Testator's estate, either in whole or in part; and in their case they insisted, from these precedents, that it appeared, that the course of proceeding in the Island in regard to the administration of a Testator's estate had for centuries been based upon the view and practice contended for by them.

Sir *R. Palmer*, Q.C., and Mr. *F. C. J. Millar*, for the Appellants :—

The question in this case is almost one of first impression. There are no reported decisions of the Royal Court as to the Law of *Jersey* on the question of the rights of Executors in respect of a Testator's personal estate. The general law is to be gathered from the Text-writers on the *Coutume de Normandie*, which is the foundation of the law and practice prevailing in the Island, and the Reports of the Commissioners for inquiring into the Law of *Jersey* in the years 1847 and 1861. The Commissioners in their Report of 1861, p. xx, say, a "Testator may appoint an Executor, who, after proof of the Will in the Ecclesiastical Court (which must be made within a year and a day of the Testator's death), takes the place of the principal heir with reference to the personal estate." *Terrien*, in his Commentary on the *Coutume de Normandie, Liv.* VI., ch. 7, p. 217 [*Paris* Ed. 1578], lays it down, that the Executors are entitled to possession of the entirety of the Testator's personal estate for a year and a day, and until the duties of administration shall have been accomplished. *Godefroy*, Comms. on the *Coutume réformée* of *Normandy, Tom.* ii. Art. 430 [Ed. 1684], *tit.* "*de Testamens*," pp. 146–147, is to the same effect. *Pothier, par Bugnet, Traité des Successions*, Vol. viii. p. 281, Art. II. §§ 212, 213, 214, § 222, p. 287 [Ed. 1861]. All these authorities support this view of the law; while the practice, as we maintain and shew by the precedents produced from the Records of the Court, prove conclusively the position for which we are contending. By the law, as well as the custom in *Jersey*, an Executor who has in due

form proved a Will, is liable to the payment of all the debts of the Testator, and may be sued by his Testator's Creditors; he is, therefore, entitled and must be empowered to get in and recover the personal estate of the Testator. It is true, that in *Jersey* a Testator is only able to dispose beneficially of a portion of his personal estate, but every person of the age of twenty years, not labouring under incapacity, has power to make a Will, and to nominate and appoint Executors, to whom he may commit the trust and duty of administering his property; and they are the only proper persons to receive and give receipts for the entirety of the personal estate, and to administer it, making over to the heir so much of the Testator's estate as he is unable by law beneficially to dispose of. The maxim, "*le mort saisit le vif*," insisted on in the Court below, applies only to a case where the deceased dies intestate. These principles are well understood in the Island, and have been continually acted on. The English law, however, perhaps furnishes most light on this subject. *Glanvil's Tractatus de Legibus et Consuetudinibus Regni Angliæ* was written at a time (A.D. 1171) when *England*, *Normandy*, and *Jersey* were under the same Crown, and the laws respecting Wills of personalty were then nearly the same in *England* and *Normandy*. He treats in Book VII., chap. v., of a Freeman not involved in debt, and says, that his moveables should be divided into three equal parts, of which one belongs to his heir, and of his Wife's right to a third, and that the remaining third he had free power of disposing, and he adds, in ch. vi., that the Executors of a Testament should be such persons as the Testator has chosen for that purpose, and to whom he has committed the charge. Mr. *Spence*, in a note to his Equity Jurisprudence of the Court of Chancery, Vol. i., p. 189, n. (*i*), observes, that "the office of Executor in the sense of heir, was unknown to the Anglo-Saxons," and he notices, that the present condition of an Executor at Common Law resembled the *hæres* of the Roman Law, and that the appointment of an *hæres* was as necessary by the Roman Law to a Will as an Executor by the English law: Ib., p. 190, n. (b.) There is no doubt, that by the English law the seisin of the whole personal estate vests in the Executor from the time of the Testator's death, and always did, even before the grant of probate: *Williams* on Executors, Vol. i., pt. i., B. iv., p. 282 [6th Ed.] The

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proposition that the heir of a Testator, where such Testator appoints Executors, has any original seisin of the Testator's personal estate, either in whole or in part, is wholly unsupported, and without authority. The whole course of proceeding in the Island in regard to the administration of Testators' estates has for centuries been based upon the view contended for by the Appellants. Extreme inconvenience would result from holding that a Testator cannot commit to Executors the duty of collecting and administering his whole personal estate.

Mr. *Mellish*, Q.C., and M. *R. P. Marett* (Attorney-General for the Island of *Jersey*), for the Respondent:—

The Respondent being the only Son of the Testator is his heir, and, according to the law and custom of *Jersey*, cannot be deprived of his inheritance. The Will, as to two-thirds of the Testator's estate, is invalid and void. The personal estate of a person dying intestate vests immediately on his death in his heir, who becomes by that event alone, and without any legal formality, seised of the whole. The principle is expressed in the *Le Grand Coustumier* by the words: "*Le mort saisit le vif sans ministère de justice*,"—the dead man gives seisin to his living heir without the assistance or intervention of justice—that is of the Courts of Law. A Testator leaving a Wife and a child or children has no power to dispose by Will of more than one-third of his personal estate, the remainder vests immediately, and by virtue of law, in his heir. The Testator in this case had no power to disinherit, as he has attempted to do, his only Son and heir, the Respondent, and the Executors, even after proof of the Will and administration granted to them, could only claim one-third for administration. But the Will in question is in dispute, a suit having been instituted by the Respondent for reducing it *ad legitimum modum*. How, then, *pendente lite* concerning the very title of the Executors, can they be heard to claim the whole of the estate, of which, under any circumstances, they could only administer one-third? In the interval between death and probate there must be seisin in some one, and that must, of necessity, be the heir. Any title, therefore, of the Executors, must be subsequent to that of the heir. How can probate divest the heir of his title? Whatever may be the rights of Executors, where

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a Testator leaves no heir, they are not seised, according to the law of the Island, of the entire personalty for a year and a day when there is an heir: *Terrien's* Commentary, *Liv.* VI. ch. 7, "*De success. et parts d'héritage;*" the passage cited for the Appellants shews that the Executors can only be entitled to so much as is required for the lawful bequests of the Testator (in the present instance to but one third), that being the meaning of "*jusques à la valeur et accomplissement du testament.*" *Pothier, Les Donations Testamentaires,* and *De la Saisine des Exécutions Testamentaires, Tom.* VII. pp. 274, 343. The Testator must be considered as having died intestate as to that part of his personal estate over which the law gave him no testamentary power, and the Respondent is entitled to the seisin of that part, namely, two thirds: *Pothier, Traité des Successions, Tom.* VII. ch. 3, sec. 2, *Coutume d'Orleans*; *Ib., Tom.* X. Art. 290, *Coutume Réformée de Normandie,* "*de testamens,*" Arts. 415, 430 [Ed. 1585].

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Their Lordships took time to consider. Judgment was now pronounced by

LORD WESTBURY:—

The Appellants are the Executors of the Will of Dr. *Thomas la Cloche,* who, at the time of his death, was domiciled in the Island of *Jersey.*

The Respondent claims to be the lawful Son and only child of the Testator.

The construction and effect of the Testator's Will, and the succession to his moveable estate, must be determined by the law of *Jersey,* being the law of the domicil.

By that law a Testator who dies leaving a Widow and a lawful child, cannot dispose by his last Will of more than one third part of his personal estate, and if the Will professes to dispose of the entirety, or more than one third part of the moveables, it is liable to be reduced *ad legitimum modum.*

The Testator died on the 13th of October, 1864. His Will was duly registered, that is to say proved, by the Appellants as Executors on the 20th of October, 1864.

The personal estate of the Testator consisted chiefly of shares in Foreign funds and Railway Companies, the certificates and coupons

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of which were at the time of his death, and still are, in the hands of his Bankers, MM. *Mallet Frères & Co.*, Bankers at *Paris*.

The Appellants demanded from MM. *Mallet Frères & Co.* the delivery of those securities to themselves as Executors. The Respondent, as heir-at-law, intervened and entered a *caveat* against such delivery.

The Imperial Court of *Paris*, on appeal, decided that as the dispute related to a Foreign succession, and concerned Foreigners only, it was itself incompetent, and that the property must remain in the hands of the Bankers until the right of possession had been decided by the Tribunals of the domicil.

Pending these proceedings in *France*, a suit was instituted in *Jersey* by the Respondent against the Appellants for the purpose of annulling the Will, and the Appellants in their defence impeached the legitimacy of the Respondent. In these suits it seems that the Court in *Jersey* of the first instance refused to set aside the Will, but made a decree reducing it *ad legitimum modum*, and also declared, that the Respondent had made out his title as lawful heir to the Testator. From these judgments both parties appealed, but at this stage of the proceedings it seems to have occurred to them that the property could never be obtained from the Bankers at *Paris* until the right to the *saisine*, or possession, of the moveable estate had been finally determined, and a final decision given on the question, whether the Executors were entitled to take possession of or recover the whole of the moveables for the purposes of administration, or whether the heir was entitled to take possession of two thirds directly, excluding any possession thereof by the Executors.

Accordingly, the Executors commenced an action in the Royal Court of *Jersey*, and by their plaint prayed a declaration that they as Executors have, by virtue of the oath that had been administered to them, and by virtue of the law and customs of the country, the *saisine*, or possession, of the entirety of the moveable succession of the deceased Testator.

In answer to this action the present Respondent pleaded that as sole heir-at-law and only child of the deceased Testator, he had right by law to the possession and ownership of two thirds at least of the moveable succession of the deceased, and that by the rule of

law, "*le mort saisit le vif*," he was seised thereof from the moment of the death of the Testator.

The judgment of the Inferior number of the Royal Court of *Jersey* was given to this effect, viz.: "considering that, according to the custom constantly followed in this Bailiwick, the Testamentary Executors are seised of the moveable property of the Testator, that the seisin of the Executors is not granted them for their own personal benefit, but rather in trust to serve the administration of the Will; that the seisin of executors is by the very nature of their duties indivisible, and that they ought to have possession of the entirety of the moveable property of the deceased, the more because, from the time of their entry into charge of it, they are bound to furnish an inventory of the entirety of the succession, and are bound to answer the demands of all who have any claims against the succession. Therefore the Court dismisses the plea of the Defender, and determines that the Plaintiffs, as Executors of the Will of the deceased, are entitled to the seisin of the entirety of the moveable succession of the deceased, and ought to be preferred to the heir in the possession of the moveables, documents, and evidences of the succession.

From this judgment the present Respondent appealed to the Superior number of the Royal Court.

Before stating the decree of the appellate Tribunal it is material to observe that the judgment of the Inferior number included the decision of the *Bailly*, who is the principal legal authority in *Jersey*.

Their Lordships think, therefore, that great weight is to be ascribed to the *Bailly's* statement of the law and custom of the Island. The Court of appeal, or Court of the greater number, were greatly divided in opinion, three of the *Jurats*, or Judges, were in favour of affirming the decision of the Court below. Two of the *Jurats* were of opinion with the Respondent, that the maxim "*le mort saisit le vif*" gave to the heir the *saisine* or possession of two third parts, and to the Executors the seisin of one third part only, of the moveable succession of the Testator.

Another *Jurat* appears to have decided against the right of the Executors, because in this particular case one of them was residuary legatee.

The two remaining *Jurats* appear to have also decided against

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the Executors, on the ground that the Will had been reduced *ad legitimum modum*, and the parties sent before the *Greffier* to prove the portions which belonged to each party; and that this had deprived the Executors of the right of claiming seisin of the whole of the moveable property. Upon the whole, a majority of five *Jurats* out of eight pronounced for the reversal of the decision of the Court of inferior number. Their Lordships have stated shortly the grounds of the judgments, because they wish it to be observed that the statement of the law or custom of *Jersey* contained in the judgment of the Court of inferior number is not in terms denied or qualified by the majority of the Judges of the Court of appeal.

In determining the abstract question raised by this appeal, their Lordships have felt anxious to form their decision entirely upon the proper evidence of the law and custom of *Jersey*, without being influenced by considerations of convenience, or by analogies derived from the laws or customs of other Countries.

Their Lordships have, however, much difficulty in ascertaining what are the recognised authorities on the law of *Jersey*.

The Book called "*Le Grand Coustumier de Normandie*," which is probably the earliest admitted authority, does not appear to contain anything on the subject of Testamentary Executors or succession of moveables, and was not cited or referred to in the argument. The commentary of *M. Terrien* on the Civil law, as well public as private, observed in the Country and Duchy of *Normandy*, was cited by the Counsel both for the Appellant and Respondent, and the Attorney-General for the Island of *Jersey* seemed to admit it to be a Book of authority in the Courts of *Jersey*. These Commentaries were published at *Paris* in the year 1574, a considerable time after the final separation of the Duchy of *Normandy* from the Crown of *England*, but apparently several years before the formation of "*La Coutume Réformée*" of the Duchy, which appears to have been prepared under the authority of Letters Patent granted by *Henry* III. of *France*, and dated the 14th of October, 1585.

The commentary of *Terrien*, therefore, may be reasonably regarded as the best evidence of the old custom of *Normandy*, and also of the Channel Islands before the separation of *Normandy* from the English Crown. In this Commentary, in the 7th chapter

of the sixth Book, which is entitled "*Des Testamens,*" after stating the law, that if a Testator be married and have a child *in potestate patris,* he cannot make a Will of more than one third of his moveable property, under the heading "*Exécuteurs,*" is the following passage:—

"*Faut suppleer icy ce qui est mis à dire de l'office & pouuoir des exécuteurs: C'est qu'ils sont saisis dedans l'an & iour du trespas du testateur, des biens meubles demourez par son decez, iusques à la valeur & accomplissement du testament, & preferez aux héritiers en la possession desdits biens meubles: comme le portit aucunes Coustumes de ce Royaume. Et peuuent dedans ledit an prendre & intenter procez pour raison de la dite exécution, & estre cónuenus comme exécuteurs, des choses contenues au testament. Et aussi peuuent & doyuent faire deliurance des lais aux légataires, quand ils ont accepté la charge de l'exécution. Acceptans laquelle & eux entremettans au faict d'icelle sans benefice d'inventoire, sont obligez aux dettes, lais testamentaires, & funerailles du défunct. Et sont appelez detteurs d'auanture par nostre Coustume . . . . Et sont tenus à rendre conte de leur exécution aux héritiers & en payer le reliquà.*"

We construe this passage as importing that the Executors are entitled to the possession of the whole of the moveable property of the Testator for a year and a day after the decease, and that their possession will continue until they have received the amount of the moveable estate bequeathed by the Will, and have also fulfilled the duties of administration.

In the *Coutume Réformée,* according to the Commentary of *Godefroy,* which was published in 1626, and the Commentary of *Basnage,* which was published in 1694, the passage which we have cited from *Terrien's* Commentary appears to form the text of the 430th Article of the *Coutume* itself, in the Chapter "*De Testamens,*" and which is thus expressed (Vol. ii. p. 147):—

"*Les exécuteurs testamentaires sont saisis durant l'an et iour du trespas du deffunct des biens meubles demeurez après le décèds, pour l'accomplissement du Testament, iusques à la concurrence des lais et autres charges, en faisant au préalable inventaire appellez les héritiers, et en leur absence les plus prochains parens: si mieux l'héritier ne veut saisir l'exécuteur testamentaire des laiz et charges en argent ou en essence.*"

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These words are nearly identical with those of *Terrien*, except that for the words "*jusques à la valeur*" are substituted the words "*jusques à la concurrence des laiz et autres charges*," which are explanatory of the words "*jusques à la valeur*." The law and course of procedure are plainly indicated by this Article. Immediately on the death of a Testator the Executors are to take possession of the whole of his personal estate, and to continue in such possession until they have collected or received sufficient property to answer the bequests validly made by the Will, the Testator's debts, and all the expenses of administration; but at the beginning of their office the Executors are bound to make an inventory of the whole of the moveables, and to cite the heirs for the purpose of seeing this done, unless the heir elect to pay or secure to the Executor the full amount of the bequests, debts, and expenses, in which case it would seem that the heir becomes entitled to the possession.

The *Coutume d'Orléans* and the *Coutume de Paris* (although they differed in this, that the *Coutume d'Orléans* included heritable property, and did not confine the rule to moveables), appear to have contained the same law or custom with respect to the *saisine* of Executors as that stated in the passage cited from *Terrien*, and embodied in the Article of the *Coutume Réformée*, as cited from *Godefroy* and *Basnage*. These *Coutumes* may be legitimately referred to for the purpose of testing the interpretation we have put on the custom as stated by *Terrien*, and also for the purpose of explaining the force and effect of particular expressions. *Pothier*, in his treatise on the *Coutumes des Duché, Bailliage, et Prévoté d'Orléans*, under the 16th title, *Des Testaments*, Article 290 (*Dupin's* Ed. Vol. x. p. 621), after referring to the 163rd Article of the *Ancienne Coutume* and to the 297th Article of the *Coutume de Paris*, states the *Coutume d'Orléans* in the following words, which are nearly identical with the passage in *Terrien*: "*Les exécuteurs des testamens sont saisis des biens meubles et héritages du testateur jusques à la valeur et accomplissement du testament.*"

At the word "*saisis*" is the following note: "*C'est-à dire, qu'ils peuvent d'eux-mêmes se mettre en possession des biens du testateur, en faisant faire un inventaire desdits biens, et sans qu'ils soient tenus d'en demander aucune délivrance à l'héritier; ce qui n'empêche pas*

que l'héritier ne demeure vrai possesseur de tous les biens de la succession, dont il a été saisi par le défunt dès l'instant de sa mort, suivant l'article 301: *car ces exécuteurs ne sont en possession que comme procureurs légaux de l'héritier, pour exécuter à sa décharge les dispositions testamentaires; de manière que l'héritier est censé continuer de posséder par eux.*"

And, again, in his "*Traités du Droit Français,*" under the head "*Traité des Testaments,*" 2nd Article, entitled "*De la Saisine des Exécuteurs Testamentaires*" (*Dupin's* Ed., Vol. vii. p. 343), is this explanatory passage:—

"*Le pouvoir des exécuteurs testamentaires consiste principalement dans la saisine, que les Coutumes accordent à l'exécuteur testamentaire, pour l'accomplissement du testament. Cette saisine est compatible avec celle de l'héritier; car cette saisine, qui est accordée à l'exécuteur, n'est pas une vraie possession; l'exécuteur, par cette saisine, est constitué séquestre; il n'est en possession qu'au nom de l'héritier; c'est l'héritier qui est le vrai possesseur de tous les biens de la succession, suivant la règle, 'le mort saisit le vif;' c'est la doctrine de Dumoulin, qui, sur l'art.* 95 *de Paris, dit: 'Hæc consuetudo non facit quin hæres sit saisitus ut dominus, sed operatur quod executor potest ipse manum ponere et apprehendere . . . . et etiam executor non est verus possessor, et nisi ut procurator tantùm.'*"

These passages appear to their Lordships to be very applicable to the case before them, and to reconcile the arguments of the Appellants and Respondents. It is true, according to this interpretation, that under the maxim "*le mort saisit le vif*" the children of a Testator are from the moment of the death the true owners of that part of the moveable estate which belongs to them, but it is equally true that the law makes the Executors *les procureurs légaux* of the heir, which procuration is irrevocable until *l'accomplissement du Testament,* and in this character the law gives the Executors full right and title, *d'eux-mêmes,* that is, in their own names, to take possession of and recover and receive the whole of the moveables for the purposes of administration. In the same article (p. 344) *Pothier* remarks: "*Observez, que l'accomplissement du Testament comprend non seulement l'acquittement des legs, mais aussi celui des dettes mobilières de la succession; car l'acquittement de ces dettes fait partie de l'exécution testamentaire.*" In the argument

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before us it was admitted by the Respondent's Counsel that it was the right and duty of the Executors to pay the debts of their Testator, and that they were liable accordingly to the Creditors, but if an obligation thus indefinite be thrown upon them it seems to follow of necessity, first, that the right to possess and retain the whole of the personal estate must remain with them "*jusqu'à l'accomplissement du Testament;*" secondly, that the portion that belongs to the Heir cannot be ascertained until the amount of this indefinite prior charge has been discovered and liquidated. This, however, must be subject to the right of the Heir to interpose and demand possession from the Executors by depositing with them the full amount of the debts and other charges of administration, and of the bequests made by the Will, if at least there be such a custom in the Island of *Jersey*, as there seems to be in the *Coutume Reformée* of *Normandy*, and in the *Coutumes* of *Orléans* and *Paris*.

The cases which have been collected and given in evidence by the Appellants, although obscure, and as to some of them of little application, yet, so far as they go, distinctly confirm the conclusion which has been stated.

Thus, in No. 12, the Court directs the Executor to deliver over a third of the net residue, *i.e.*, of the clear residue, to the legatees; and in the case cited (No. 14) the judgment of the Court is thus prefaced: "Considering that the execution of a Will cannot be regarded as ended until the Executor has recovered all that may be due to the succession of the Testator, and out of it has paid his debts, and more particularly in the case No. 16, which was decided on the 24th of March, 1860, the Court, in the record of its judgment, lays down the following principles:—

"1. That a testamentary Executor is seised in full right of the moveables of a succession for a year and a day from the date of the death of the Testator.

"2. That these moveables during the year and the day are in the custody and under the personal responsibility of the Executor.

"3. That after possession for a year and a day the Executor must carry the Will into effect, and deliver good and faithful accounts to the person entitled."

No case or other authority has been cited by the Respondent in support of the judgment appealed from.

By way of confirmation of the conclusion which their Lordships are disposed to draw from the authorities they have cited may be added the illustrative fact, that shortly after the Norman invasion of this Country the present law or custom of *Jersey* appears to have prevailed in *England*, and was most probably, therefore, brought in by *William* the Conqueror. It is stated by *Glanvil* to have been the Common law of the land in the reign of *Henry* II. with respect to moveable successions; and accordingly the Wife and the children were entitled to recover from the Executors their proportionate parts of the personalty of the Testator, and the writ entitled *De rationabili parte* was framed for their relief, which plainly shews that the Executors were regarded as entitled, in the first instance, to the seisin or possession of the whole of the personal estate. Without dwelling, therefore, on the great inconvenience that would result from such a rule as is contended for by the Respondent, their Lordships are clearly of opinion, that the judgment appealed from is erroneous, and contrary to the established law and custom of *Jersey*, and they will, therefore, humbly advise Her Majesty to reverse the judgment appealed from, to affirm the judgment of the Court of the inferior number, and to direct the Respondent to pay to the Appellants their costs of the proceedings in the Court of the superior number, and also their costs of this appeal (1).

Solicitors for the Appellants: *Jones, Blaxland, & Son.*
Solicitors for the Respondent: *Hancock, Saunders, & Hawksford.*

(1) The restriction imposed on a Testator disposing of more than one third of his moveable estate is at the present time the law in *Scotland*: *Regiam Majestatem, Lib.* II., c. 37; *Bell's* Dic., tit. "Dead's part."

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Jan. 24, 25.

DAVID DOUGLAS YOUNG AND ALFRED F. A. KNIGHT . . . . . } APPELLANTS;

AND

JAMES THOMAS LAMBERT . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Goods in Custom House—Detainer of, for duties, storage, &c.—Advances made on pledge of goods, subject to lien—Constructive possession and delivery—Rights of execution Creditors.

Goods imported from *England* into *Quebec*, consigned to *M. & S.*, and stored in the Customs Warehouse there, according to the Customs' regulations for freight, duties, and storage, were, by a contract in writing, pledged by *M. & S.* for advances made to them by *G. & K.*, and a note of such pledge entered in the Book of the chief Officer of the Customs, specifying the conditions on which the loan was made, with a request to such Officer to hold the goods subject to the orders of *G. & K.*, they paying the duty and storage charges before removal. *L.*, a Creditor of *M. & S.*, obtained judgment in an action against them, and, under a *fieri facias*, seized the goods so in Bond, the execution of which was opposed by *G. & K.*, who made an application *main levée* to the Court, on the ground, that by the above contract the property of *M. & S.* in the goods in question was conveyed to them to secure repayment of the advances made by them. The Judge of the Superior Court allowed such opposition, holding that the Opposants, *G. & K.*, were Pledgees of the goods in question. Such judgment, though overruled by the full Court, and afterwards by the Court of Queen's Bench in *Lower Canada* on appeal, upheld by the Judicial Committee, who were of opinion, that the circumstances of the case and the dealings of the parties constituted a constructive delivery, and that the judgment which dismissed the opposition of *G. & K.*, and gave effect to the seizure under the execution to their prejudice as Pledgees, could not be supported.

THIS was an appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, affirming a judgment of the Superior Court sitting in review, which latter judgment reversed a judgment of the Superior Court, granting, upon the application of the Appellants, *main levée* of the seizure of certain goods taken in execution by the Sheriff of *Quebec*, while lying at the Government Ware-

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

house in that City, under a *fieri facias* upon a judgment recovered by the Respondent, *Lambert*, against *Maxwell & Stevenson*, Merchants, of *Quebec*.

To this seizure the Appellants filed an opposition *afin d'annuler*, alleging, in effect, that the goods had been assigned to them, before the writ was issued, in pledge by Messrs. *Maxwell & Stevenson* as security for an advance of $1,800, together with interest, commission, and other charges thereon; and that, at the time of the seizure, the goods were in their lawful possession as Pledgees as security for a sum of $2,058. 55c., to which the whole sum so due to them then amounted.

To the opposition the Respondent pleaded the general issue, and also, as a special *exception péremptoire en droit*, that Messrs. *Maxwell & Stevenson* were, at the time of the advance, notoriously, and to the knowledge of the Opposants, insolvent, and had stopped payment; that the goods pledged constituted their whole estate, and that the transaction was illegal and in fraud of the Creditors.

Evidence was entered into, the effect of which is stated in the judgment. The *enquêtes* of both parties having been closed, the case was heard on the merits before Mr. Justice *Stuart*, one of the Judges of the Superior Court, who, on the 2nd of July, 1867, gave judgment for the Appellants, declaring them Pledgees of the goods in question, and granting *main levée* of the seizure thereof.

The Respondent having inscribed the cause upon the roll for review before three Judges, it was again argued before the Chief Justice *Meredith*, and Justices *Stuart* and *Taschereau*, and on the 5th of February, 1868, the Court gave judgment, reversing the judgment of the 2nd of July, 1867, on the ground, that the Appellants did not obtain possession of the goods so as to give effect to the contract of pledge, and dismissed the opposition of the Appellants with costs. Mr. Justice *Stuart* dissenting.

From this judgment the Appellants appealed to the Court of Queen's Bench of the Province of *Quebec;* and on the 19th of September, 1868, that Court gave judgment confirming the judgment of the Superior Court.

The facts of the case, and the evidence, so far as it is material, are fully stated by the Judges in the reasons transmitted by them to the Judicial Committee. As the Respondents did not appear

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on the appeal, and the case was heard *ex parte*, these reasons formed the only grounds for the support of the judgment of the Court below; such reasons being specially referred to by their Lordships in their judgment, which overruled the decision of that Court, it is thought proper to give them entire. They were framed by Mr. Justice *Badgley*, and concurred in by Justices *Duval*, *Caron*, and *Drummond*, and were as follows:—

"The circumstances of the case are the following:—The goods seized under the writ of execution, and the subject of this contention, were imported from *Britain* into *Quebec* by the Steamer *St. David*, and the freight being unpaid they were reported by the Shipmaster to the Customs' authorities at the port, and there landed and stored in the Customs Warehouse as consigned to the Defendants, a Commercial firm, and to be there held for freight and charges. The goods were received into the Warehouse on the 6th of August, 1864, by *Metivier*, the Warehouse-keeper, who then and there entered them in the usual manner in his store-book, with the names of the Consignees, and as subject to freight and charges upon them. This was done under the authority of the *Provincial Customs Act* (*Consolidated Statutes of Canada*, c. 17, s. 11, cl. 4, and sect. 14, cl. 4), which required all imported goods to be entered for duty, but allowed them to be deposited for a limited time in the Warehouse without entry, after which they became subject to forfeiture for the duty chargeable upon them, the right of the Shipowner or Master for freight and charges being preserved in the meantime under the following provision of the Act: 'that, notwithstanding the landing of the goods and storage in the Warehouse before entry, nothing should affect any contract between the Owner or Master of the Vessel in which the goods had been brought to *Canada* and the Owner and Consignee of the goods." The law allowed the landing of the goods for the convenience of the Shipowner or Master, instead of detaining the Vessel in port with the goods on board until the freight should be paid, but they remained subject to the same rights and liabilities under the Bill of lading as if they were still afloat, and subject to the lien and special privilege of the Shipowner or Master maintained by the Act, the Customs Warehouse, in which the goods were deposited, becoming, so to say, the Vessel. Under these circumstances, the Warehouse-keeper

was, as it were, in the performance of his duty, the Agent and depositary of the goods for the Shipowner or Master, to retain possession of them for him, and to prevent the exercise of any control over them by the Consignees until after the freight had been paid. It is not denied, that the Defendants, *Maxwell & Stevenson*, were the Consignees and Owners of the goods, but they did no act of ownership, and took no seeming interest in them until the 19th of August, 1864, when, being in want of funds, they applied to the Appellants for an advance of money upon the security of the goods, the possession of which they had not received, and the Appellants, having apparently satisfied themselves of the value of the goods, and of the title of the Consignees to them, from a cursory inspection of some documents in the hands of the latter, advanced to them their promissory note at three months for $1,800, the goods being worth £500 sterling, about $2,500, for which the Appellants received from the Consignees their written contract of pledge of the goods, shewing the terms of the advance, and also their written delivery order to *Metivier*, the Warehouse-keeper, to give effect to their contract of pledge. The delivery order was forthwith presented by the Appellants at the Warehouse to *Metivier*, who there and then, on the same 19th of August, wrote across its face the word 'accepted,' and subscribed his signature thereto; he also made an entry in his store-book opposite to his original entry of the receipt of the goods into the Warehouse in the following words: 'subject to *D. D. Young's* order.' *Metivier* affirms, that was his practice at *Quebec* in the Warehouse, and that he made the entry in his store-book to keep his acceptance in mind, in order that in case the goods were claimed by any one he should require the order of *D. D. Young & Co.* for their delivery. Between the 6th and the 19th of August, therefore, the goods remained deposited in the Warehouse, landed, but not delivered to the Consignees, and by the law in the possession of the Shipowner or Master. *Maxwell & Stevenson* discounted the note, and received the proceeds, on the 20th of August, 1864, and at its maturity it was retired and paid by the Appellants. One of the Defendants has stated, that the proceeds of the note were applied in part in discharge of their business liabilities, and in part in payment of the freight, $414.34c.; but no date of payment has been proved, nor has any voucher therefor

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been produced, nor was any intimation of the payment apparently given to the Customs or the Warehouse-keeper of the freight having been paid; on the contrary, the goods in the Warehouse remained as unclaimed goods, as stated by *Metivier*, until the following 30th of December, when the Consignees bonded them for duty in their own names, and they were so entered and recorded in the bonded Warehouse Book, thereby, under the *Customs Act*, becoming susceptible of sale and transfer by the Consignees themselves, without any displacement from the Warehouse in which they had been originally deposited after they were landed. Now, if the freight had been paid at all, the payment could not have been effected until the 20th of August, 1864. It might be days after the date of the contract of pledge and of the so-called acceptance of the delivery order by *Metivier*. During these occurrences the prior right of lien, and the special privilege of the Shipowner or Master for his freight, together with his legal possession and custody of the goods, had in no way been interfered with, and no possession of them had been delivered to the Consignees, nor had they any dominion or control over them, or any other right over them than the right of property in them; indeed there could be no complete delivery of the goods to the Consignees, nor could they have any absolute dominion or control over them, under the Bill of lading, until their liability for the freight stipulated to be paid by the Bill of lading had been discharged. Until that time the delivery order was inoperative, and the contract of pledge was inchoate and not susceptible of consummation, and could not avail to the Appellants, who, notwithstanding, remained passive after the 19th of August, 1864, without taking any further action or proceeding to secure themselves. In the following May the Appellants, desiring to realize their advance, directed their Auctioneer to advertise the goods for sale by public auction, to take place in the month of June, 1865, when the Respondent, a judgment Creditor of the Consignees in whose name they were bonded, caused the goods to be seized in execution in the Warehouse as their goods, and thereby prevented the intended sale. Thereupon the Appellants filed their opposition *afin d'annuler*, claiming to set aside the seizure, and demanding to be declared the lawful Proprietors of the goods, and entitled to retain them as Pledgees of them, and to be maintained

in possession of them, until paid the sum of $2,058. 55c. for their advances, with interest thereon, &c., due by the Defendants, Consignees as aforesaid, and secured by the pledge of the goods, and finally, that the seizure should be declared null and void, and that *main levée*, discharge thereof, should be granted in their favour, unless the Respondent, Plaintiff aforesaid, chose rather to pay to them forthwith the above-stated sum of money, with the interest, as above, and costs of the opposition. The seizing Creditor, the Plaintiff (Respondent in this appeal), contested the opposition of the Appellants upon two grounds; first, the insolvency of the Defendants, to the knowledge of the Opposants, at the time of the execution of the contract of pledge and of the making of their advance, thereby operating as a fraud upon the Creditors of the Defendants, and, amongst others, of the Plaintiff; and second, the want of possession by the Opposants of the goods at any time, either as Pledgees of them, or in any other capacity or quality. Proceedings having been taken by which the issues were completed, and evidence having been adduced, the case was argued before the Superior Court *en première instance,* by whose judgment the opposition was maintained; but that judgment was set aside by the Court in revision, and the opposition of the Appellants was dismissed by the final judgment of the latter Court, upon the ground alleged, that the Opposants had not obtained possession of the goods so as to give effect to the contract of pledge alleged in the opposition, and ignoring altogether the first ground of objection. As to the latter, it may be observed, that its averments as against the Opposants have not been proved, and in themselves they were not sufficient to deprive the Opposants of their pledge, if it had been legally completed, because at the date of the contract the Defendants were the Owners of the goods, and had not been divested of their right of property in them, and also because the pledge was not given as security for a previous debt either due or to become due by them to the Opposants, but for a present advance, and an equivalent value given by them, as disinterested persons, and for which alone the goods were pledged as security. Had this contention presented the features of a sale of the goods, or of a transfer or deposit in pledge of the Bill of lading by the Consignees to the Opposants, no difficulty would probably

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have arisen, because the Bill of lading, being the symbol of property in the goods, would have carried that property with it, diverting the property from the Consignees, and vesting it in the Opposants as owners of the goods, subject nevertheless to the payment of the freight and charges under the Bill of lading. 'The law gave the peculiar effect it has to the Bill of lading in consequence of the difficulty of an actual delivery of the possession of the goods which are the subject of a mercantile adventure. So long as the difficulty exists by reason of the incidents of the adventure, so long does the reason apply,' as observed by Mr. Justice *Willes* in a somewhat similar case, *Meyerstein* v. *Barber* (1). Now, such a difficulty did exist here, because of the unpaid freight at the time of the advance, and of the acceptance of the delivery order, and subsidiarily because of the want of transfer of the Bill of lading by the Consignees, and, therefore, as matters stood, there could have been no actual delivery to or by the Consignees of the pledged goods, and which in consequence were in the same position as if afloat. The reason why the property of goods at sea is represented by the Bill of lading, and passes by indorsement and delivery of that document, is, that it is the only legal mode in which the possession of the goods, under such circumstances, could be given; and, as remarked by Chief Justice *Erle*, this is common knowledge, and the indorsement and delivery of the Bill of lading in such case operate exactly the same as the delivery of the goods to the Assignee after the Ship's arrival would do (2); and so in like manner it would be if the deposit of the Bill of lading had been made to the Pledgee for advances upon it. *Massé, Droit Commercial, Tom.* VI., No. 502, gives the same effect to it. He says: '*Le connaissement est un acte portant reconnaissance de la part du Capitaine d'un navire de marchandises chargées sur ce navire, et engageant de les remettre à un lieu indiqué et à une personne désignée. C'est la lettre de la voiture de la mer. La remise du connaissement équivaut à la remise de la marchandise même puisque le porteur du connaissement a seul qualité pour en exiger la délivrance.*' *Massé* adds, that it is negotiable by indorsement like Bills of exchange and promissory notes to order. Now, this case presents none of the features of a sale or of a deposit of the Bill of lading; it is the case of an ordinary

(1) Law Rep. 2 C. P. 58. (2) Law Rep. 2 C. P. 45.

pledge of goods, in which possession must accompany the pledge, and upon this point there is perfect agreement in the jurisprudence of Commercial nations. This is also common knowledge, and it would be mere waste of time to cite authorities in support of it from English, French, or American law, or from our own Code. Indeed, this point is not disputed by the parties themselves. The delivery of the thing pledged by the Debtor to the Creditor to remain with him, and to be detained in his possession till redeemed, is an essential constituent of pledge, without which the contract is simply executory, as observed by *Story*, and the *droît de gage* of the Creditor under the French and our own law, as explained by *Troplong, Priviléges et Hypothèques*, is unavailing. He says, as to '*délaissement de la chose par le débiteur et la mise en possession du créancier, il faut que le créancier soit saisi, et il n'y a pas de gage sans tradition réelle de la chose.*' But these systems of jurisprudence which require a custody in the Pledgee, by which he acquires the special property, or the *droît de gage*, in the pledge, leaving the general property in the Pledgor, accompany their requirement of custody and possession with the qualification that both delivery and custody may be constructive and be equally effective with the actual. *Troplong* says: '*Cependant le gage a lieu lorsque la chose a été remise à un tiers commis entre les parties.*' *Pothier* speaks of the tradition *brevis manus*. *Story* says, that the delivery need not be an actual manual delivery of the thing; it is sufficient if there are any of those acts or circumstances which in contemplation of law are sufficient to pass the possession of the property. *Bell*, in his Commentaries, holds the same doctrine. Our own Code speaks of the *possession d'un tiers convenu entre les parties*, and the point has been settled in a very recent case in *England* in 1866, *Meyerstein* v. *Barber* (1), in which the matter is exhausted by Mr. Justice *Willes*, who says: 'Now, with respect to a pledge, according to the law of this Country a mere contract of pledge of even specific goods, and even though money is advanced upon the faith of the contract, is not sufficient to carry the legal property of the goods. But in order to complete the pledge it is not necessary that there should be an actual delivery of the chattel to the Pledgee; it is sufficient, as was decided in *Reeves* v. *Capper* (2), and the other cases to

(1) Law Rep. 2 C. P. 51.

(2) 5 Bing. N. C. 136.

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which reference was made in the course of the argument, if there be a constructive delivery. It is not necessary that the subject of the pledge should have actually passed from the hands of the Pledgor to those of the Pledgee. The property of the goods may pass, though they remain in the possession of the Pledgor, provided they do so by virtue of a contract between the parties, which makes the custody of the Pledgor the custody of the Pledgee; so, in many cases, a symbolical delivery is held to be sufficient, being equivalent to such a constructive delivery as will complete a pledge.' And *Massé*, at p. 498, says: '*Le privilége ne subsiste sur le gage qu'en autant que ce gage a été mis et a resté en la possession du créancier ou d'un tiers convenu entre les parties. Le créancier est mis en possession par la délivrance qui lui est faite de la chose soit par une tradition manuelle et matérielle soit par une tradition feinte, mais qui n'en est pas moins réelle dans ses effets.*' And further on, *Massé* subordinates the privilege *du gage à cette condition*, '*que les marchandises soient à sa disposition dans ses magasins ou dans un dépôt public, ce qui suppose le plus ordinairement une tradition matérielle.*' In this case the goods were in the *dépôt public*, the Customs Warehouse; but the *supposition de la tradition* could not apply, because, though they were landed and stored under the provisions of the Act, they had in fact been so landed and stored in the interest of the Shipowner or Master only, and had never come into the possession of the Consignees, either materially or constructively. The precautionary insurance effected upon them by the Consignees was quite justifiable in their own interests as Proprietors, but in itself did not divest the Shipowner, or give them possession or control of the goods. The preferential privilege of the Pledgee in the thing pledged, according to our law, is undeniable over the Creditors of the Pledgor, when the contract is complete and perfect; but even granting this, that privilege is subject to certain rights preferable to itself, such as freight: "*Il n'y a de créances préférables à celle du gagiste que celles qui tiennent en quelque sorte en suspens la propriété de la chose, ou qui sont dûes par la chose plus que par la personne, à qui la chose appartient. Telle est la créance du prêteur à la grosse, tel est le fret, ou le prix du transport dû au capitaine ou voiturier: en effet ce qui touche le prêteur à la grosse, &c.; et quant au fret ou au prix du transport,*

il est clair que le voiturier ou le capitaine n'ont pas à s'occuper de savoir à qui est la chose ; c'est à cette chose qu'ils s'adressent pour être payé quelqu'en soit le destinataire, le propriétaire, ou gagiste." This is plainly the lien for freight, or the possession of the goods by the Shipowner or Master, guaranteed to him by the Provincial Act, and by the Common law, until the freight shall have been paid and liquidated. The real difficulty in this matter is the tradition spoken of by the Authors; the Consignees had the property of the goods, but they had neither tradition nor delivery of them, either material or constructive; they could have no dominion or control over them until after they had freed them from the lien or special privilege of the Shipowner or Master, which by law kept the goods in his possession, and prevented the Consignees from giving to the pledgees under their contract of pledge, or by the force of the delivery order, any possession adverse to the recognised legal possession of the Shipowner. Had the freight been paid when *Metivier* noted the delivery order, he could not thereby have become the common Agent of Pledgor and Pledgees, and his acceptance could not have protected the Opposants, because of the impolitic and illegal assimilation of the Customs Warehouse and of its Keeper, a subordinate departmental servant, with a private Warehouse and its Owner. Until payment the goods were in store for the Shipowner, just as if they had still been in the Ship, from which neither the Consignees nor *Metivier* could remove them without the authority of the Shipowner or Shipmaster, or his discharge of his special gage. The objection made of the detention of the goods for duties is not material in this contention, which turns upon the Opposant's want of possession of the pledge, actually or constructively, on the 19th of August, 1864, a want which they neither covered nor supplied at any subsequent time. The main requirement of the law for the completion of the contract of pledge having, therefore, no existence, the opposition upon that ground is untenable, and the judgment in revision is correct. It must also be observed, that the opposition could not be supported upon another ground. The concurrence of the various systems of jurisprudence above referred to, in the essential constituent of the pledge itself, is not maintained in their modes of realizing it for the payment of the debt secured by it. The English, and kindred English Common law systems, empower

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the Pledgee to sell the pledge either by the authority of the Common law, or by force of a stipulation to that effect in the contract, protecting thereby his possession as well as his special property in the pledge up to the sale of it: but the French and Scotch, as well as our system, require that the pledge should be sold by judicial sale, which is in legal effect equally protective of the lien or possession of the Pledgee. The pledge not constituting property in the Pledgee, the law requires him to obtain a judgment against the Debtor whose property it is, and an order for the sale of the pledge, to realize from the sale the debt secured by the gage, his *jus in re aliena.* Having only a right to be paid out of the realized pledge, the property in it continuing in the Debtor, it is seizable as his property, and may be taken in execution by a judgment Creditor of the Debtor owner, without disturbing the Pledgee's right to the proceeds so far as they may pay his privileged debt. The Pledgee may claim to be paid his privileged debt out of the proceeds of the judicial sale, by opposition *afin de conserver,* but he cannot prevent the seizure and sale, as in this case, by an opposition *afin d'annuler,* as Proprietor of the pledge, to set aside the seizure. If he could do that, he might not choose to realize at all until it suited his particular interests, by which those of the Debtor's Creditors might be jeopardized, and injury inflicted upon them. The 1971st Article of our Code prevents the Creditor from disposing of the pledge, and declares our Common law as follows: 'He may cause it to be seized and sold in the usual course of law, under the authority of a judgment of a competent Court, and obtain payment by preference out of the proceeds,' because by the 1972nd Article 'The Debtor is owner of the thing pledged until it is sold, &c., it remains in the hands of the Creditor only as a deposit to secure the debt.' We cannot shut out this law from this case; and under these circumstances, also, the judgment of the Court in revision, in so far as it dismisses the opposition, must be maintained, with costs of this Court and of the Superior Courts, original and revisory."

From the judgment so rendered by the Court of Queen's Bench the present appeal was brought.

Young, one of the Appellants, died after the institution of the appeal, which was prosecuted by the Appellant *Knight.*

The Respondent, as before stated, not appearing the appeal was heard *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *H. M. Bompas*, for the Appellants:—

Notwithstanding the elaborate reasons of the learned Judges of the Court below, which, in the absence of the Respondent, we must take as their grounds for supporting the decision in his favour, the case is, as we maintain, one of the clearest kind; and the judgment cannot be supported. The goods in question have been validly pledged to the Appellants. The possession of *Metivier*, from the time he accepted the delivery order from Messrs. *Maxwell & Stevenson*, was the possession of the Appellants, notwithstanding the existing lien for freight and charges. The goods were, therefore, constructively in the possession of the Appellants at the date of the seizure. Goods in the possession of a Pledgee cannot be taken in execution by a judgment Creditor of the Pledgor: *Eyre* v. *McDowell* (1); *Beavan* v. *Lord Oxford* (2); *Watts* v. *Porter* (3). The Customs' right to detention for Custom dues was immaterial. The Code Civil of *Canada* provides for the very case before us. *Tit.* XVI., Chap. II., "Of Pawning," Art. 1969, declares, "The pawn of a thing gives to the Creditor a right to be paid from it by privilege and preference before other Creditors." Art. 1970 enacts, "The privilege subsists only while the thing pawned remains in the hands of the Creditor, or of the person appointed by the parties to hold it." Art. 1977 declares "The rights of the Creditor in the thing pledged to him are subject to those of third parties upon it, according to the provisions contained in the title of 'Privileges and Hypothecs,'" and Art. 1978 states, that "The rules contained in this chapter are subject in Commercial matters to the laws and usages of commerce." It is clear, that *Maxwell & Stevenson* had no legal right, or actual power, to take possession of, or interfere with, or to sell the goods, without first paying to the Appellants the sum due to them. The Creditors of *Maxwell & Stevenson* could have no further rights in that respect than their Debtor.

(1) 9 H. L. C. 619.
(2) 6 De G. M. & G. 492.
(3) 3 E. & B. 743.

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Their Lordships' judgment having been reserved, was now delivered by

SIR JOSEPH NAPIER:—

In this case the Respondent claims the benefit of a seizure of goods, under a writ of *fieri facias*, issued on a judgment recovered by him against Messrs. *Maxwell & Stevenson*, of *Quebec*, Merchants. The writ was issued on the 30th of May, 1865, and certain goods, alleged to be the property of Messrs. *Maxwell & Stevenson*, were seized under the writ by the Sheriff. The Appellants opposed the execution on the ground, that by a contract in writing, bearing date the 19th of August, 1864, the property of *Maxwell & Stevenson* in the goods in question was conveyed to them, and an authority to sell expressly conferred by *Maxwell & Stevenson* for the purpose of securing repayment of advances made by the Appellants on the faith of this contract; and as repayment had not been made, that the seizure under the writ should be set aside.

The cause was heard in the first instance by Mr. Justice *Stuart*, one of the Judges of the Superior Court of *Lower Canada*. He allowed the opposition, and, after declaring that the Opposants were Pledgees of the goods in question, he granted *main levée* of the seizure thereof, that is, directed an *amoveas manus* against the execution Creditor. This decision was reviewed by the full Court. The majority of the Judges held, that the contract had not been perfected by delivery of possession of the goods so as to constitute a pledge; and on this ground they reversed the decision of Mr. Justice *Stuart* and dismissed the opposition to the execution.

The case was then taken by appeal to the Court of Queen's Bench of *Lower Canada*, and the judgment of the Superior Court was affirmed. The appeal to Her Majesty in Council, now under consideration, has been brought against the judgment of the Court of Queen's Bench.

In the reasons of the Judges, which have been elaborately drawn up by Mr. Justice *Badgley*, the material point of contention is stated to be, the Opposant's want of possession of the pledge, actually or constructively, on or after the 19th of August, 1864. It is at the same time stated, that "the preferential privilege of the Pledgee in the thing pledged, according to our law, is undeni-

able over the Creditors of the Pledgor, when the contract is complete and perfect." It is suggested (but for the first time) that supposing the contract of pledge to have been completed, the course adopted by the Appellants in opposing the execution was not in accordance with the Canadian law.

The goods in question were shipped at *Liverpool*, on board a Steamer called the *St. David*. They arrived at *Quebec* early in August, 1864, and were reported by the Master of the Vessel at the Customs in *Quebec* as consigned to Messrs. *Maxwell & Stevenson*.

According to the regulation of the Customs, the goods were taken to their examining Warehouse, and in the Book of *Metivier* (the chief Officer in charge of the Warehouse) an entry was made of them as consigned to *Maxwell & Stevenson*. They were marked "*M. & S.*" The lien on them for freight continued, and they were also liable to detention until the charges for Customs' duties and storage had been satisfied. Subject to these conditions, the Consignees had the ownership and the possession of the goods, and also the right of dealing with them according to the rules of law applicable to transfers of goods that are subject to charges, and actual delivery does not take place at the time of the transfer.

The Officer in charge of the Warehouse was bound not to part with the goods until the several claims for freight, duties, and storage had been discharged. But he was at liberty, with the sanction of the Consignees, to substitute in his Warehouse-book the name of another as entitled to their property and possession subject to the conditions then subsisting.

"The general rule of my office" (says *Metivier*) "is, when a party applies to transfer the goods to another party, I generally make a remark in my Book to keep in mind of asking a proper order from the party to whom the goods are transferred, and that is very often."

The goods having thus been placed in the Customs examining Warehouse, and the entry having been made in the Book of *M. Metivier, Maxwell & Stevenson*, on the 19th of August, 1864, asked for and obtained from the Appellants an advance of $1,800 on the goods, described in the receipt for the "advance, signed by *Maxwell & Stevenson*, as wire-rope, rigging, &c., marked *M. & S.*, ex steamer *St. David*, and now in Her Majesty's examining Ware-

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house; said advance to be repaid to *D. D. Young & Co.* on or before the maturity of their note, together with a commission of 5 per cent. on amount advanced. Should the advance not be repaid at that time, *D. D. Young & Co.* to have the right of selling the rigging, &c., and paying themselves out of proceeds."

A request note of the same date, directed to the Officer in charge of Her Majesty's examining Warehouse, and signed by *Maxwell & Stevenson*, was given by them to the Appellants, whereby the Officer was requested "to hold the goods" (described as in the receipt) "subject to the order of *D. D. Young & Co.*, they paying the duty and storage charge before removal." On the same day this was sent to *M. Metivier*, who wrote across it—"Accepted, *F. X. Metivier*," and it was then returned to and kept by the Appellants. *M. Metivier* also wrote an entry in his own Book opposite to the entry made when the goods were first placed in the warehouse. This second entry was—"Subject to *D. D. Young's* order." He says: "I made that entry in order that, in case the said wire and rope-rigging were claimed by anybody, I should require the order of *D. D. Young & Co.* before delivery." He further says that he would not have delivered the goods to *Maxwell & Stevenson*, or to any other, without an order from the Appellants.

Thus, as between the Customs and the Appellants, the latter stood precisely in the position in which *Maxwell & Stevenson* had stood before the request note was accepted and the entry made in the Warehouse-book by *M. Metivier;* and as between the Appellants and *Maxwell & Stevenson*, the goods in question were sufficiently transferred for the purposes of the pledge or mortgage.

It appears to their Lordships, that by the express agreement of the parties in this case, followed by the acceptance of the chief Warehouse-keeper, there was a valid constructive delivery of the property comprised in the contract, and that the judgment under appeal, which dismissed the opposition and gave effect to the seizure under the execution, to the prejudice of the rights of the Appellants as Pledgees, cannot be supported.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Queen's Bench should be reversed, and that in lieu thereof it should be ordered that the

judgment of the Superior Court, which reversed the judgment of Mr. Justice *Stuart*, should also be reversed, and the judgment of Mr. Justice *Stuart* be affirmed, with costs in both Courts. The Appellants are entitled to have their costs of this appeal.

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Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*

GALE WENTWORTH BOSTON AND OTHERS APPELLANTS;

AND

SIMEON LELIÈVRE, CYRILLE DELAGRAVE, AND NORBERT DUMAS . . . RESPONDENTS.

J. C.* 1870 Jan. 25.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, DISTRICT OF MONTREAL, CANADA (APPEAL SIDE).

Procedure in Canada—Appellate jurisdiction of the Court of Queen's Bench—Certiorari—Consolidated Statutes of Lower Canada, c. 77, s. 23; c. 88, s. 17; and c. 89, s. 6.

No appeal lies in a case of *certiorari* from the Superior Court to the Court of Queen's Bench in *Lower Canada*; so *held* by the Judicial Committee, confirming a judgment of that Court, on an appeal from the judgment of the Superior Court quashing a writ of *certiorari* issued out of the Superior Court, to remove into it certain proceedings of the Seigniorial Revising Commissioners, in which they had disallowed a claim for compensation for the loss of seigniorial rights.

Chap. 88, s. 17, of the consolidated Statutes of *Lower Canada*, expressly excepts cases of *certiorari* granted by the Superior Court from appeal, and is not included in the general terms of s. 23 of c. 77, providing for the allowance of appeals from the Superior Court to the Court of Queen's Bench.

THIS was an appeal in which the Appellants sought to obtain a reversal of the judgment of the Court of Queen's Bench (on the appeal side) for the Province of *Quebec*, District of *Montreal*, whereby it was held, that no appeal lies from the Superior Court to the appeal side of the Court of Queen's Bench, on a judgment of the Superior Court quashing a writ of *certiorari* issued out of that Court.

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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The following were the facts of the case:—

John Boston, was, in his lifetime, *Seignior* of the *Fiefs* and *Seigniories* of *Thwaite* and *St. James*, in the District of *Montreal*.

In the year 1855 two Acts of the Colonial Legislature were passed, the 18 Vict. c. 3, and the 18 Vict. c. 103, for the purpose of effecting the abolition of Feudal Tenures, and provisions were made to ascertain and settle the amount of compensation to be granted out of the public revenue to the *Seigniors* whose feudal rights and privileges were taken away. Certain Commissioners were appointed, each of whom within the Districts assigned to him was to prepare a schedule of each *Seigniory*, shewing the particulars of the rights existing and to be compensated. Public notice was to be given of the time and place at which the Commissioner would proceed to make the necessary inquiries, and the parties affected were entitled to appear, give evidence, and be heard before the Commissioner. The schedule was then to be deposited in a place where all parties interested were to have access to it. The Governor was to appoint four of the Commissioners, of whom any three should form a Court, for the revision of the schedules; and any person aggrieved by the decision of the Commissioner who had prepared the schedule of any *Seigniory* was to be at liberty to present a petition to the Revising Commissioners, who were to hear and decide upon the objections raised. Their decision was to be final.

Boston presented his claim to *Judah*, the Commissioner appointed to prepare the schedule for the *Seigniories* of *Thwaite* and *St. James*. He claimed to be entitled to seigniorial rights to the value of £16,200. The Commissioner, after having heard evidence respecting it, prepared his schedule, whereby he allowed only a small portion of the amount claimed.

The Claimant then presented a petition to the Respondents, the Revising Commissioners, and the same was heard by them, sitting as a Court, under the provisions of the before-mentioned Acts. They made some alterations in the schedule, but in all substantial and material respects confirmed the decision of Commissioner *Judah*, and disallowed nearly the whole of the claim; whereupon the Claimant obtained from the Superior Court for *Lower Canada* a writ of *certiorari*, under which the proceedings before *Judah* and the Respondents were brought up into the Superior Court.

A motion was then made on behalf of the Attorney-General for *Lower Canada* to quash the writ of *certiorari*, and upon the 27th of June, 1862, judgment was given in the Superior Court quashing the writ of *certiorari*. The judgment stated, that the Commissioners had taken an erroneous view of the law in rejecting some of the claims of *Boston*, but decided that as they had in no respect exceeded their authority, or jurisdiction, there was no ground for quashing their proceedings.

Boston thereupon sued out a writ of appeal to the Court of Queen's Bench in *Lower Canada*, but, upon motion made by the Attorney-General, that Court quashed the writ of appeal, holding that in cases of *certiorari* no appeal lies. This was the judgment now appealed against.

Mr. *H. M. Bompas* (Sir *R. Palmer*, Q.C., with him), for the Appellants:—

By consent of all parties concerned, the only point now to be argued is, whether an appeal lies to the appeal side of the Court of Queen's Bench from the judgment of the Superior Court, quashing a writ of *certiorari*. This point involves two questions: first, was there originally a right of appeal from a judgment on *certiorari*? and, secondly, if so, has such appeal been taken away? The Court of error and appeal was first established in *Lower Canada* by the local Statute, 34 Geo. 3, c. 6; that Statute is repealed; but the provisions regarding the appellate Court are re-enacted in c. 77, s. 23, of the consolidated Statutes of *Lower Canada*, by which a general power of appeal, in all cases where the matter in dispute exceeds the sum of £20, is given to the Queen's Bench, as a Court of appeal and error, from any judgment rendered by the Superior Court. This, therefore, must include a judgment on *certiorari*.

The *Solicitor-General*:—We admit, that if that section stood alone, the matter in question being within the appealable value, an appeal would lie; but we rely on chapters 88, s. 17, and 89, s. 6, of the consolidated Statutes of *Lower Canada*.

Mr. *Bompas*:—Then, what is there in chapters 88 and 89 to preclude an appeal in the case of *certiorari*? Section 17 of c. 88 provides for appeals from judgments under that Act, and excepts

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cases of *certiorari*, but does not take away the general right of appeal under c. 77, which is neither mentioned nor referred to; and c. 89, though it substitutes an interlocutory judgment for *certiorari*, does not prohibit or abolish such writ, but leaves it as a Common law right. In *Reg.* v. *Paty* (1) it was held, that a writ of error is of right in all cases where not taken away, excepting only Treason and Felony. The case of an award of a peremptory Mandamus is different. There no writ of error lies, though error lies in the first instance on the award to remand, where bail is refused: *Pender* v. *Herle* (2); *Rex* v. *The Dean of Dublin* (3); *Vin.* Abr. tit. "Error" (E. c.), Vol. x. p. 24, *et seq.*

The *Solicitor-General* (Sir *John D. Coleridge*), and Mr. *A. Wills*, for the Respondents:—

The question turns entirely on the constitution of the appellate Court, the Court of Queen's Bench in *Lower Canada*. Whether that Court has jurisdiction to review a decision of the Superior Court in a case of *certiorari?* We contend it has no such power. The Court of Queen's Bench on the appeal side is a Court of error, similar in all respects to the Court of error in the Exchequer Chamber here, and it has never been contended that that Court ever had such a jurisdiction. The proceeding by *certiorari* here is merely for the purpose of removing process from an inferior to a superior Court. The powers of the Superior Court in *Lower Canada* are defined by the consolidated Statutes, c. 78, by section 4 it is provided, that: "Excepting the Court of Queen's Bench, all Courts and Magistrates, and all other persons, and bodies politic and corporate within *Lower Canada*, shall be subject to the superintending and reforming power, order, and control of the Superior Court and of the Judges thereof, in such sort, manner, and form as by law provided." There is no express provision in the consolidated Statutes as to cases in which a *certiorari* may be granted, but it may be assumed, that in cases of an excess of jurisdiction the Court of Queen's Bench might grant *certiorari* in the first instance. But the real question is, whether the grant of *certiorari* is applicable to the appellate side of the Queen's Bench. The constitution and

(1) Salk. 503. (2) 3 Bro. P. C. 505.
(3) 1 Str. 536.

powers of the Court of Queen's Bench are defined by the consolidated Statutes, c. 77. By sect. 4 of that Statute it is provided that "The said Court, and the Judges thereof, shall have, hold, and exercise an appellate civil jurisdiction, and also the jurisdiction of a Court of error, within and throughout *Lower Canada*, with full power and authority to take cognizance of, hear, try, and determine in due course of law all causes, matters, and things appealed or removed by writ of appeal, or of error, from all Courts and jurisdictions wherefrom an appeal or writ of error by law lies or is allowed." The provision as to cases in which an appeal lies is contained in the 23rd section of the 77th chapter, and is thus, "An appeal shall lie to the Court of Queen's Bench as a Court of appeal and error from any judgment rendered by the Superior Court for *Lower Canada*, in any District, in all cases where the matter in dispute exceeds the sum of £20 sterling, or relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or such like matters or things, where the rights in future might be bound, though the immediate value or sum in appeal is less than £20 sterling." It must be on that section that the Appellants rely, and if that section stood alone, the matter in dispute being above £20, it is admitted that there was, in the circumstances of this case, an appeal. But the question really in dispute in the proceeding by *certiorari* was not, whether a particular sum was, or was not, payable by way of compensation to *Boston*, a matter which the Superior Court had no power to determine, but whether or not the Commissioners had exceeded their jurisdiction. The enactment cited, however, does not stand alone, for by sect. 6 of c. 89, of the consolidated Statutes, intituled "An Act respecting writs of prohibition, *certiorari*, and *scire facias*," it is enacted, that "Appeals from final judgments rendered under this Act, except in cases of *certiorari*, are provided for by c. 88, which is "An Act concerning the protection and enforcement of corporate rights;" and certain provisions with respect to Mandamus, and proceedings in the nature of *quo warranto;* and by sect. 17 it is enacted, that "An appeal shall lie to the Court of Queen's Bench sitting in appeal, from all final judgments rendered by the Superior Court in all cases provided for by that Act, and c. 89 of the consolidated

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Statutes, except in case of *certiorari*." Chapters 88 and 89, therefore, expressly negative the right of appeal in cases of *certiorari*. They shew that the intention of the Legislature was, that the grant of a *certiorari* being in its nature a matter of discretion with the Superior Court, no appeal shall lie from that Court.

At the conclusion of the argument their Lordships' judgment was delivered by

LORD WESTBURY:—

Their Lordships are not insensible to the importance of this case. At the same time they feel that they would not act rightly if they were to overrule the unanimous judgment of the Court below, upon a question of this nature, unless they were perfectly satisfied that the Judges had committed an error in refusing the exercise of their appellate jurisdiction.

The question is governed entirely by the language of the Colonial Statutes. The Court of appeal in *Lower Canada* is the creation of Statute, and the subjects upon which appeal lies to that Court are defined with reasonable clearness. The jurisdiction of the Court existed before the consolidated Statutes, but the consolidated Statutes annulled all the antecedent Statutes upon the subject. The consolidated Statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one Statute, instead of being separate Acts.

The material sections to which their Lordships' attention has been directed by the able arguments they have heard, are the 23rd section of chapter 77, and chapters 88 and 89. The 23rd section gives generally a right of appeal to the Court of Queen's Bench from any judgment pronounced by a Superior Court, in all cases where the matter in dispute exceeds the sum of £20 sterling.

The Solicitor-General admitted, that if this section stood alone, the matter in dispute here might fairly be taken as involving the determination of a matter of property exceeding £20; but he directed our attention to the two subsequent chapters, which are most important, namely, the 88th and 89th chapters.

The 88th chapter, in sect. 17, gives an appeal from all final

judgments rendered by the Superior Court after the 30th of June, 1858, in all cases provided for by that chapter and chapter 89, except cases of *certiorari*.

The cases provided for by chapter 89 are cases of writs of prohibition, of writs of *certiorari*, and of writs of *scire facias*.

The fact, therefore, which has to be inquired into is:—Did this writ of *certiorari* fall under the provisions of chapter 89? for if it did, the exception applies. But, there can be no question that the chapter 89 gives the rule under which writs of *certiorari* shall for the future issue, be treated, and decided. It is the Code of procedure with reference to that particular writ. It simplifies the proceedings under it, and makes them correspondent with proceedings in ordinary cases.

Therefore, the writ of *certiorari* here was provided for by that particular enactment.

The chapter 89, sect. 6, repeats, "Appeals from final judgments rendered under this Act, except in cases of *certiorari*, are provided for by chapter 88." It expressly refers, therefore, to the antecedent chapter for the purpose of making the directions given in that chapter applicable, by the express words of the reference, to all cases provided for by the Statute. Their Lordships, therefore, are of opinion, that the *certiorari* in this case must be considered as governed by chapter 89; and if so, then to have been excepted from appeal.

This is the ground upon which it appears to their Lordships that the judgment of the Court below can and ought to be supported. Their Lordships would hesitate very much to interfere with the unanimous judgment of the Court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the Court had made a great mistake in the construction put upon these Statutes. They think, that construction is more in conformity with general principles of law upon the subject of these writs, and they think also, that it is a construction which they are compelled to affirm by the interpretation they are obliged to put upon the meaning, intent, and object of chapter 89; and holding, as their Lordships are obliged to do, that this case fell under the regulations of that Statute, and dealing with this appeal as if it were a special case raising an

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appeal to us on this simple question: Does an appeal lie in a case of a writ of *certiorari* to the Court of Queen's Bench from the Order made by the Superior Court?

Their Lordships will recommend to Her Majesty that, without prejudice to the other questions involved in the appeals which the Appellants were permitted to present, and which remain for decision, as to this particular question involved in the present appeal, they will humbly advise Her Majesty to affirm the Order of the Court below *quoad hoc*, and to direct the expenses to be paid by the Appellants, the deposit made by the Appellants remaining entire to answer the expenses of the other appeals.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondents: *Ashurst, Morris, & Co.*

J. C.* 1870 Jan. 28, 29.

MUSSUMAT FANNY BARLOW . . . . . APPELLANT;

AND

SOPHIA EVELINE ORDE AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE PUNJAUB, LAHORE.

Will of English Testator domiciled in the North-Western Provinces of India—Status—Religion—Rule of Construction—Illegitimate children—Gift to "children" as a class.

S., a Military Officer in the *East India Company's* service, died in 1841, domiciled in *Delhi*, in the *North-Western Provinces of India*. At the time of his death there was no *lex loci* in those Provinces, and the law applicable to the succession depended on the personal *status*, which was regulated by the religion of the individual; and in the event of such rule not being applicable, the Courts were, as provided by the Regulations, to determine according to the rules of justice, equity, and good conscience. There was no evidence that *S.* professed any particular religion. *S.* had five illegitimate Sons acknowledged by him in his lifetime, and several Grandchildren, all of whom were, with one exception, illegitimate. By his Will, made in the English form, after giving life estates to his five Sons, he bequeathed as follows:—"I will and declare, that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons (naming them) dying leaving issue or children that the share of the Fathers shall devolve on the issue or children,

* *Present*—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., AND SIR LAWRENCE PEEL (Indian Assessor.)

to be by them divided in equal shares." *J.*, an illegitimate Son of one of the Testator's five Sons, born some years after the Testator's death, claimed, under the above devise to "children," to share with his legitimate Sister a moiety of his Father's one-fifth share :—

Held (reversing the decree of the Courts in *India*), first, that the technical rule of English law, that under a testamentary gift to children as a class, illegitimate children, although recognised by the Testator in his lifetime, cannot share with natural lawful children, was not applicable, and that, under the circumstances, it was impossible to apply any particular law of construction to *S.*'s Will, or to regulate his succession, and that, therefore, the case fell to be decided, as directed by the Regulations, by the principles of natural justice, equity, and good conscience; and,

Secondly, that the limited signification which the English law puts upon the word "children" when used as the designation of a class, and not as *descriptio personæ*, was not to be followed in construing *S.*'s Will, as the word "children" in such Will denoted and included as well illegitimate as legitimate children, and such illegitimate children having been recognised and treated by *S.* as his children, effect was to be given to the devise, according to the actual meaning in which the Testator used the word "children," whereby he intended to include illegitimate children of his Son's whenever acknowledged by their putative Father, and that the illegitimate child of *J.* took equally with his legitimate sister under *S.*'s Will.

THE question raised in this appeal was upon the construction of the Will of the late Colonel *Skinner*, C.B., in the Military service of the *East India Company*, who died, in the year 1841, domiciled in the *Delhi* Territory, which then formed part of the *North-Western Provinces of India.*

The suit was brought by the Appellant on behalf of herself, as guardian of her infant Son, against the Respondents, to establish the Will of Major *James Skinner*, deceased, the putative Father of the infant Plaintiff, and to recover possession of a moiety of a fifth part or share of the estate and property devised by the Will of his Father, Colonel *Skinner*, to his five illegitimate Sons equally, and to their issue or children; and also to recover possession of a fifth part or share of Major *James Skinner* in certain other estate and property which was purchased and acquired by Colonel *Skinner's* Sons subsequent to his death, by means of the income derived by them from the estate and property; which last-mentioned fifth share of the accretions was devised and bequeathed by the Will of Major *James Skinner* to the Appellant, and his Son, the infant, *James Skinner.*

The principal questions raised by the suit and adjudicated on in

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the Courts below were:—First, whether it was the intention of Colonel *Skinner* to include in the devise to his Son's issue or children, their illegitimate children, and in particular, whether the above-named infant, *James Skinner*, was entitled to the moiety of the fifth part or share of his Father's interest in the estate and property, upon his death, under the devise; and, secondly, whether the fifth part or share of his Father in the subsequently purchased and acquired estate and property passed by the devise thereof in his Will to the Appellant and his infant Son, or whether, as was contended by the Respondent, *Orde*, the same was to be considered as an increment to the original estate, because purchased by means of the income arising therefrom, and as such was to be considered subject to the limitations and conditions affecting the estate contained in the Will of Colonel *Skinner*.

By the decree of the Officiating Deputy Commissioner of the *Hissar* Division in the *Punjaub*, both these questions were decided in favour of the Appellant and her infant Son; but on appeal therefrom the same was reversed by the Officiating Commissioner and Superintending Civil Judge, and an appeal brought from such decree of reversal was rejected by the Judicial Commissioner of the *Punjaub*. The effect of these decrees, now appealed from, decided against their claims *in toto*, holding that illegitimate children were excluded by the Will of Colonel *Skinner*, and that the estate and property purchased and acquired after his death was to be considered as an increment to, and, therefore, as part and parcel of, his original estate, and so subject to the limitations and conditions therein contained.

The facts of the case were as follows:—

Colonel *James Skinner*, C.B., was an Indian soldier of fortune, and had, for military services performed to the *East India Company*, obtained from Government, in the beginning of the present century, an *Altumgah* grant of a large *zemindary* situate in the *Boolundshuhur* District, in the *North-Western Provinces*. He had also, by purchases made in his lifetime, acquired considerable other landed and house property; and he possessed at his death many villages, on leases, some granted to him by the Government, and others by other proprietors. A portion of the property was situate in the *Delhi* territory, which, at the time of the commencement of the

suit in which the present appeal has arisen, was under the administration of British Officers forming the *Punjaub* Government.

It appeared that the management of the estate was carried on at *Hausee*, in the *Hissar* District. It further appeared that a renewed grant of the *zemindary* and the villages therein contained was made by the Marquis of *Hastings*, the then Governor-General, in Council, to take effect from the commencement of the year 1226 *Fusly* era, corresponding with the 15th of September, 1818, in *Altumgah*, in the following terms :—"To Colonel *Skinner*, and his heirs after him, or to such persons as he may devise by his last Will and Testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share shall conform himself to the dispositions of the said Will."

Colonel *Skinner* died in December, 1841, domiciled in the *North-Western Provinces*, in possession of the *Altumgah, zemindary*, and other landed property, including the leased villages, as well as of considerable personal property, leaving him surviving no legitimate children, but leaving five illegitimate and acknowledged Sons, namely, *Joseph* and *James*, and the Respondents, *Hercules*, *Alexander*, and *Thomas*, and two illegitimate Daughters named *Louisa* and *Elizabeth*, and one Grand-Daughter, the Respondent, *Orde*, the only legitimate Daughter of his Son, *James Skinner*.

It appeared that Colonel *Skinner* was himself illegitimate, born in *India ;* and that all the children of his Sons (with the exception only of the Respondent, *Orde*) were likewise illegitimate.

Colonel *Skinner* made a Will, dated the 10th of May, 1841, disposing of the whole of his immoveable and moveable estate and property, which Will was proved, and a certificate of administration of his estate and property was obtained from the proper Court by *Joseph Skinner* and *James Skinner*, two of the Executors and Managers.

The important clauses in the Will which the question raised by the suit affected, were as follows :—

"I will and bequeath the rest of my property, of whatever nature, I may die possessed of, or may be coming to me by gift, Will, or as heir-at-law, or in any other manner, to my Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, or the surviving heirs

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of them, in equal shares or dividends," and then, after giving certain specific legacies, proceeded in these terms:—I leave and bequeath the income of my *Altumgah, zemindary,* and *Theka* villages, gardens and houses, to my five Sons herein named, *Joseph, James, Hercules, Alexander,* and *Thomas Skinner,* to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the *Altumgah* or *zemindary.* One of my Sons, whichever is most fit, or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income, and he is bound to shew a faithful account current yearly to his Brothers.

"Should they like to live together, they may live at *Belaspoor,* and build houses with mutual consent in the *Altumgah* or *Zemindary.*

"Should my personal property not pay off all my debts, they may sell my house at *Delhi,* and my garden at *Trevellian Gunge;* but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five Sons.

"In the event of the death of any of my boys previously to attaining the age of twenty-one years, without issue, his or their portion or portions of the *Altumgah, zemindary,* and *Theka* villages shall revert to the surviving Brothers for the benefit of the survivors and their heirs, and his or their portion or portions of other property willed by me shall be equally divided amongst all my surviving male children.

"I will and declare that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons, *Joseph, James, Hercules, Alexander,* and *Thomas Skinner,* dying and leaving issue, or children, that the share of the Fathers shall devolve on the issue, or children, to be by them divided in equal shares.

"I will and declare that in the event of the death of all my reputed children, *Joseph, James, Hercules, Alexander,* and *Thomas Skinner,* and without issue, that my *Altumgah* rights, *zemindary, Theka* villages, and all and every of the sums bequeathed, and eventually bequeathed to them, shall devolve to my Daughters, *Louisa* and *Elizabeth,* and to my Granddaughter *Sophy,* or their

lawful issues, to my late Brother, Major *Robert Skinner's* children, and their issues, in equal shares and dividends."

Colonel *Skinner* died in December, 1841, leaving his five Sons mentioned in his Will surviving, who thereupon took possession of the estate left by their Father.

On the 25th of October, 1855, the eldest Son, *Joseph Skinner*, died, and *George Skinner*, claiming to be his Son, applied for a certificate to his Father's estate. This was assented to by his Uncles *Thomas, Alexander* (one of the Respondents) and *James*, but opposed by *Hercules* on the ground of *George* being illegitimate: this objection was overruled, and a certificate allowing him to collect the debts of the deceased *Joseph* was granted. It appeared that *George* remained in possession of his Father's share for several years, and was killed at *Delhi* in May, 1857, leaving a Wife and Daughter, the Respondents, *Helen* and *Victoria Skinner*.

The second Son, Major *James Skinner*, was during his Father's lifetime married to *Sophia Barlow*, by which marriage he had one Daughter only, the Respondent, *Orde*. He also cohabited with his Wife's eldest Sister, *Charlotte*, by whom he had a Son, *Stewart*, and also with the Appellant, his Wife's other Sister, by whom he had a Son, *James*, the infant in the suit.

On the 10th of November, 1859, Major *Skinner* made his Will, the only material parts whereof were as follows:—

"I give, devise, and bequeath my share of the landed interests devised to me by the last Will and Testament of my late Father, Colonel *James Skinner*, dated *Hausie*, 10th May, 1841, consisting of *Altumgah, zemindary, Theka* villages, Indigo factories, houses, and other lands specified therein, also all and every sum and sums of money which may be due to me at the time of my decease, and also all other debts, or money, or Bonds, or other securities, to be equally divided between my Daughter, Mrs. *Sophia Eveline Orde* and my Son *James*, and to their descendants in perpetuity, and a salary of Rs. 100 per month to their respective Mothers, Mrs. *Sophia Elizabeth Skinner* and *Fanny Barlow*, alias *Villaetee Begum*, which on their demise is to revert respectively to their children above-named, viz., Mrs. *Skinner's*, to my Daughter, Mrs. *Orde*, and *Fanny Barlow's* (*alias Villaetee Begum*), to my son *James*, and likewise, in case of the decease of the children without issue or

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descendants, their share is to revert respectively to their Mothers as above-mentioned. And I request my Executors will adopt measures to carry these my last wishes into effect, as also to pay for my Son *James'* schooling and maintenance as long as he is a minor, and to invest the surplus of his share in the best Government loan that may then be open, and to be made over to him on his attaining the age of maturity, or twenty-one years. As my Son *James* is not educated, or otherwise provided for, I leave and bequeath to him and to his Mother, *Fanny Barlow, alias Villaetee Begum,* the whole of the villages, landed property, &c., &c., &c., which have been purchased for the estate since the late Colonel *Skinner's* demise, and in which I have a fifth share, as also my house, out-offices, and other lands at *Hausie,* and on their demise the share of one to devolve on the other, if my Son *James* may die without issue or descendants. Should I happen to die in debt, I ardently hope and beseech my Executors to effect such arrangement and compromise with my Creditors as will not prevent the above legacies from being carried into effect, otherwise to make a proportionate deduction from the share or income of each legatee."

Major *Skinner* died in 1861 without having revoked his Will, leaving him surviving his Wife *Sophia,* his legitimate Daughter *Orde,* his Wife's Sister (the Appellant) and his illegitimate Son, *James.* Various proceedings took place in the Revenue Courts as to the substitution in the Government Books of the name of his Son *James* in the place of that of Major *Skinner.* On the 8th of October, 1861, an application was made in the Judge's Court by Major *Skinner's* Wife, *Sophia,* and his Daughter, the Respondent, *Orde,* for a certificate to be granted to them under the Act, No. 27 of 1860, to administer to the estate of Major *Skinner.* This application was opposed by the Appellant on behalf of herself and her minor Son *James.* The Will was relied upon by her, and the question of its validity discussed before the Judge, who, on the 20th of December, 1861, decided in favour of granting the certificate to the Respondent, *Orde.* Against that decision the Appellant appealed to the *Sudder Dewanny Adawlut,* which Court, in July, 1862, confirmed the decision of the Judge.

On the 4th of June, 1863, the Appellant commenced the suit out of which the present appeal arises by filing on behalf of her-

self and her Son *James* a plaint in the Deputy-Commissioner's Court against the Respondents. The object of the plaint was to have Major *Skinner*'s Will declared valid, and to have a decree for possession of one-tenth of the whole estate left by Colonel *Skinner*, and one-fifth of subsequently acquired property.

At the hearing it was contended, that Major *Skinner* had no power to make a Will affecting the property acquired from Colonel *Skinner*, and while the right of the children of Major *Skinner* to succeed to the property both original and conjointly acquired of the estate by virtue of Colonel *Skinner's* Will, was admitted, the claim made by the Appellant, *Fanny Barlow*, to any portion of the property or interest therein whatsoever was denied.

The following issues were recorded:—"The meaning of the parties having now been satisfactorily ascertained by careful examination, the issues may be determined. On law there are none. On fact, the following:—First, did the original Testator contemplate the exclusion of illegitimate offspring or issue, in favour of legitimate? Second, is there any recognisable difference between the original estate or inheritance, and that subsequently acquired? Third, had Major *Skinner* the power of devising any portion of his interest in the *Skinner* estate; and if so, what portion? Fourth, had Major *Skinner* the mental capacity requisite for the preparation and execution of a Will? As regards the first issue, it is to be determined by the Will itself, as each party construes it suitably to his own views, and the construction is open to argument; both parties have filed their proofs, which are altogether documentary. On the second issue, the proof rests on the Plaintiffs: they will file their documentary proofs, and produce certain documents named in the *Hissar* record Office and *Skinner* estate Office. The third issue is to be decided by the Court on discovering the tenor of the Will. The fourth issue, the Attorney of *Sophia Orde* will prove."

From the evidence given in the suit the capacity of Major *James Skinner* to make and execute his Will was distinctly proved.

The hearing took place on the 13th of October, 1863, before *J. Horne*, Esq., the Officiating Deputy Commissioner of *Hissar*, when he gave judgment, finding for the Plaintiffs on all the four issues, and decreeing the property claimed in full; and as to

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costs, ordered each party to pay their costs, except the Defendant, *Khially Ram*. On the first issue the judgment was in these terms:—

"The all important point to be determined in this case is, what was the intention of the original Testator, as ascertained by the terms of his Will? I have given the subject careful consideration, and it is with much diffidence that I feel myself forced to a conclusion other than that expressed by a very high legal authority. It is, however, satisfactory to know that this is, as it were, but a preliminary inquiry, since the decision will certainly be appealed. The Devisor's words, I would observe, *in limine*, must be their own exponent, if the context of the Will should, as I believe, disclose the Testator's intention, no quantity of parol evidence can be allowed to contradict their import. It is obvious that one of the Testator's leading motives was to perpetuate his name; for he not only prohibits the division of the estate under all circumstances, but he bequeaths merely the 'income' thereof to his Sons, and after them to their surviving male children; and this provision is repeated and qualified by the succeeding paragraphs, wherein it is provided that the share of the Father shall devolve on the children —'to be by them divided in equal shares.' He provides for the continual management of the undivided property, and directs the preservation of his war trophies and presents in the paternal Hall at *Belaspore*, as a lasting memorial of him. The same sentiment pervades his disposition of his Brother *Robert's* estate, 'My will and intention being that the said *Jageer* shall continue to the nearest of blood in perpetuity.' Now the perpetuation of the Testator's name could be only through male children; hence his specification—'all my surviving male children.' We see, that after providing for the distribution of the property amongst his direct male issue, he goes on to bestow it on his Daughters and Granddaughter *Sophia* (Mrs. *Orde*) by name, and the collateral heirs—the issue of his Brother *Robert*. Now the wording of this clause certainly does convey, as conclusively as it can be ascertained, the intention of the Testator; among them *Sophia Orde* is the only child born in wedlock; she is near to him in the ties of consanguinity, and yet he gives her no preference over the children of *Robert Skinner*, who are all ille-

gitimate, but bequeaths the property to them in 'equal shares and dividends.' Here, then, Colonel *Skinner* gave no precedence to the law of legitimacy; indeed, if the word 'lawful,' as used in conjunction with the word 'issues,' of the female conditional Devisees, is not accidental, it would appear as if the Testator disregarded the illegitimacy of his Son's offspring, but scrupulously barred the succession of other than his Daughter's legitimate offspring. The Plaintiffs lay stress upon this phrase—'lawful issue;' and I admit, that without giving it any undue weight, it is a qualification perfectly consistent with man's instincts and conventional laws, which condone the adultery of a man, while punishing ruthlessly the unchastity of the woman. It is deposed by Major *H. Skinner*, and by *Thomas Skinner* and *George Everett*, that at the time of the execution of Colonel *Skinner's* Will *George* and *Joseph*, illegitimate children of *Joseph Skinner*, the eldest son of the Testator, were living, and yet it is seen that Colonel *Skinner* did not exclude them from his Will; and from this fact, coupled with the fact of his open recognition of *George*, the illegitimate Son, deposed to by the foregoing, the inference is, that the Testator did not consider illegitimacy a sufficient reason for their exclusion from social and hereditable rights." The judgment then further proceeded under this issue as follows:—"We see that on the death of *Joseph*, *George*, his illegitimate Son, inherited, three of the Brothers supporting his claim, and *Hercules* alone dissenting; but *Hercules* is married and has lawful issue, and this may, insensibly to him, have biassed his judgment in this matter. In reference to the plea, that even if illegitimate children are entitled to inherit by the Will of Colonel *Skinner*, he could never have designed that the fruit of an incestuous intercourse should debar the legitimate offspring from their rights, I must confess I do not see its force. I observe, however, that the Judge of *Meerut* took this view. I consider that we are not to determine the issue on ethical grounds, but on the terms of the Will and by the analogies it contains. There we find that illegitimacy is recognised, and no expression or allusion is used subversive to the claim of the Plaintiffs; the right of this minor, therefore, may be admitted by implication. This deduction, however hostile to morality, is, I believe, con-

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formable to the terms of the Will, to which implicit deference, as long as the Will in its entirety is upheld, is due. If the circumstance pleaded by Defendants of the boy *James*, the child of an incestuous intercourse, acting as a bar to the succession of the legitimate heir, is an aggravation of the evil of recognising illegitimacy never contemplated by the original Testator, it is no part of the Judge to amend it." On the second issue the judgment proceeded:—"As regards the increase in landed property the Defendants do not dispute it; their only plea is, that such increase has become by simple accretion an integral part of the estate. *Alexander Skinner* admits, that the proceeds of the estate are divisible by the co-sharers; but he appears to argue, that because some of these proceeds were spent by the Manager in the acquisition of additional lands without consulting the co-sharers, this fortuitous circumstance places the lands purchased with this money, rightly within the co-sharers' control, beyond their control or disposal. This doctrine is as untenable as novel. That the acquired property is a reality and no fiction is clearly ascertained by the long list filed by the Plaintiffs, consisting of some ninety villages, worth, according to *Khialy Ram's* valuation, and not challenged by the other Defendants, two and a-half *lakhs*. It is deposed by him, and he was intimately associated with the transactions of the estate during the lifetime of Major *James Skinner*, and he is still a confidential Agent of the co-parceners in the estate, that whereas the original estate was involved to the extent of eleven *lakhs* at the time of the decease of Colonel *Skinner*, all this debt was, by 1860, cleared off, with the exception of a little more than a *lakh*, in addition to which all these lands were acquired. Subsequent to Major *James Skinner's* decease four *lakhs* of money were borrowed from *Luchmee Chund*, the *Muthra* Banker, but the main portion of this was employed in the liquidation of the debts of the co-sharers. How far the acquired property may be liable for this debt is not now a question raised, and, therefore, not considered, but it appears that the Bond has primary reference to the original estate. The ascertainment of what is and what is not property accruing to the co-sharers after the demise of the original Testator can be a matter of no difficulty. A list already exists, drawn out by orders of Major *Hercules Skinner*, of which *Alexander Skinner*, Defendant, the

officiating Manager, admits a copy, and it is presumed correct, since it is not challenged, is filed with the plaint. If there is any error in this list it can form the subject of objection on the execution of the decree which will issue in this case; at the present time the principle is the important point." On the third issue he held, that "As regards the third issue, or the authority of Major *James Skinner* to make a Will disposing of this property, I conceive that he had no right, under the provisions of his Father's Will, to dispose of any portion of the original estate. The issue found in favour of the boy *James* is by the Will of the original Testator, and quite independent of the Will of Major *James Skinner*. But that he had power over the acquired property there can be no doubt, for, as pertinently observed by the Judge of *Meerut*, 'A man may do as he likes with his own.' The matter is susceptible of further elucidation, but the opinions of the Civil Courts of *Delhi* and *Meerut, vide Robucarree*, of the 11th of August, 1860, and judgment of December, 1861, concur, and the question is itself obvious." On the fourth issue, as to the mental capacity of Major *James Skinner* at the time of the execution of his Will, the Court held that he was of full testamentary capacity, and the judgment then concluded:—"I consider that Colonel *Skinner* by his Will gave no preference to legitimate heirs over illegitimate; that there is a difference between the subsequently acquired property and the original estate; that Major *James Skinner* had the power to will away this acquired property, but no other portion; and that he was possessed of mental capacity to make a Will; I, therefore, find for the Plaintiff on all the issues, and the property claimed is decreed in full."

The Respondent, *Orde*, appealed to the Civil Court of *Hissar*.

The appeal was heard before *J. Naesmyth*, Esq., Officiating Commissioner, Superintendent, and Civil Judge of *Hissar*, who, on the 26th of January, 1864, reversed the decree of the Lower Court on the three following points:—First, the legal inability of the late Major *James Skinner* to bequeath property already entailed; second, the objection to the construction of the Lower Court in regard to the intention of the late Colonel *Skinner* as regards the term 'issue or children'; and third, the objection to the ruling of the Lower Court to the effect that landed property, purchased for the

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estate, from the estate proceeds (before dividend of net profits) subsequent to the demise of the late Colonel *Skinner*, was unfettered by the limitation placed on the succession in the Will of Colonel *Skinner*, and was at the absolute disposal, according to his share, of each sharer.

With respect to the first point, the judgment stated:—"It seems clear to the Court, that the late Major *James Skinner* was not empowered to devise his share in the *Skinner* estate otherwise than had been provided for by the Will of his Father, the late Colonel *Skinner*. His power to bequeath was confined to the personalty, and to any real property which he may personally have acquired. A distinction has been drawn by the Lower Court in regard to the estate, between property strictly ancestral, and that subsequently purchased for the estate from the estate proceeds, which question will more appropriately come under notice when considering the third plea of appeal." As to the second point, the judgment proceeded:—"The ambiguity and obscurity of the late Colonel *Skinner's* Will in this respect are remarkable. For reasons explained at some length, the Lower Court has recorded an opinion and judgment in favour of the construction, that legitimate and illegitimate issue should share equally in the succession. This decision is based on what the Lower Court conceived to be the intention of the Testator, as gathered from the context of the Will and the usage of the family. To the appellate Court, however, it appears that this inference is by no means evident, or even probable, from the context; the occurrence of the term 'lawful,' as applied to the female issue in the succeeding clause of the Will, does not seem sufficient to warrant the conclusion, that the omission of that term elsewhere implies a recognition of illegitimate issue as regards the male branch of the family. The strict and primary meaning of the term 'issue or children,' when used in a document such as this, and with no distinct declaration of, or obvious allusion to, a contrary intention, can, it seems to the appellate Court, only be legitimate issue or children—*i.e.*, born in wedlock. It appears also in the highest degree improbable, that the late Colonel *Skinner* (whatever may have been his own domestic relations) could have desired, to the manifest detriment of his Sons and their legitimate heirs, his own Daughters and their lawful issue, and the legitimate

female child of his Son *James*, who is specially mentioned in the Will, that the inheritance (which he was so anxious should be maintained in its integrity, and of which he so strictly forbids even the partition) should be frittered away in innumerable shares on the illegitimate offspring of his Sons. The whole tenor of the Will appears to the appellate Court to be opposed to such a construction, and the dubious passages do not seem to point with any reasonable probability to any such intention. The appellate Court is consequently of opinion, that 'issue or children,' as used in the Will, must be held to signify legitimate issue only." Upon the third point, the judgment proceeded:—"There is no doubt of the fact that property has been added to the estate subsequently to Colonel *Skinner's* death, partly by purchase and partly by gift of Government. The question is, can such property be regarded as absolutely at the disposal of the co-sharers, according to the share of each, or is it subject to some restriction that limits the succession to the property which formed the estate at the time of Colonel *Skinner's* demise? With one exception, any such distinction is strongly objected to by the existing sharers. The '*Theka* villages' are undoubtedly covered by the meaning of the Will, and, as regards these, there would seem to be no room for doubt that they are in all respects subject to the provisions of the entail. The property was purchased, prior to any division of profits, from the proceeds of the estate, with the joint consent of the co-sharers, expressed or understood, the Agent being the Manager; and without the consent of all the co-sharers it does not appear to the appellate Court that this subsequently acquired property can be regarded as circumstanced otherwise than as the rest of the entailed joint estate. The interest of each sharer is a life interest only. Even were all consenting, it is by no means clear that any difference would be legally admissible. Under all the circumstances of the case the appellate Court thinks it would not. The case of entailed estates in *England*, as observed by the Lower Court, does not seem analogous, or to apply in the case of a joint concern, such as the *Skinner* estate. Of course, landed property purchased by any sharer personally with his own means is 'his own;' but this is quite distinct from the joint estate acquisitions under notice.

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The appellate Court, therefore, considers that the distinction which has been allowed by the Lower Court is not in this case admissible. It is not within the province of this Court, in recording a judgment in this appeal case, to pass any opinion as to the particular claims of Mrs. *Orde* to succeed to the vacant share, which it has been herein ruled is not inheritable by illegitimate issue or children, and is not divisible in the manner admitted by the District Court. The obscurity of the Will has already been referred to, and a question, as to whether 'issue or children' was intended as to immediate succession (as distinguished from reversionary) to be limited to male heirs, when considering in conjunction clauses 10 and 11 of the Will might possibly be raised. This decree, therefore, is to be understood only as applying to the three issues as above described; and as leaving the matter as to who is or who are the immediate legitimate heirs in tail under the Will for settlement by the family or otherwise, as they may deem fit."

The Appellant appealed from this decree to the Court of the Judicial Commissioner of the *Punjaub.*

The hearing took place on the 21st of January, 1865, before *A. A. Roberts,* Esq. The points urged on the appeal were:—First, that the decision of the officiating Commissioner was opposed to the true construction of the Will of Colonel *Skinner,* and to the usage of the family. Secondly, that there was a difference between the estate left by Colonel *Skinner* and the after-acquired property; and thirdly, against the Order for payment of costs, as the Commissioner had declared that the Respondent, *Orde,* was not entitled to any share in the estate; and it appeared that the Counsel for the latter had moved the Court for a declaratory Order in favour of her title.

The material part of the judgment of the Judicial Commissioner, *A. A. Roberts,* Esq., was in these terms: "Colonel *Skinner* unquestionably had power to entail his estate, and he did so in a special manner. I concur with the Court below, that it was not competent to Major *James Skinner* to interfere by devise with the succession to the *Skinner* estate (or to any share of that estate) which had already been settled by the Will of the founder of the family and of the estate. Secondly, the construction of the Lower Court, that the words 'issue or

children' must be held to signify legitimate children, is quite correct, as also does the word 'heirs' mean legitimate heirs. Thirdly, I also agree with the Lower Court, that the property purchased prior to any division of profits from the proceeds of the estate by the Manager or Managers, became a portion of the entailed joint estate, and falls under the provisions of Colonel *Skinner's* Will. As regards the Respondent's (Defendant's) request for a declaratory Order in her favour, the Court does not understand on what ground she seeks such an Order, but she is of course entitled to all the benefits resulting from the decision of the three issues raised between her and the Plaintiff, and which are all against the latter. This Court, at the same time, considers the remarks of the Lower Court, immediately after the decision on the last issue and previous to affirming the appeal, altogether superfluous. I reject the appeal with all costs, whether in this Court or the Courts below."

From this decree of affirmance the present appeal was brought.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant:—

Two questions arise, first, upon the construction of Colonel *Skinner's* Will, whether *James Skinner's* children, one of the Testator's five illegitimate Sons, took under the Colonel's Will their Father's share as tenants in common; and, secondly, whether a fifth part of the accretions acquired by the Devisees from the surplus of the Testator's estate after his death did or did not pass by *James Skinner's* Will.

With respect to the first question, it is clear, that it was the intention of the Testator, Colonel *Skinner*, by the devise in his Will to his five Sons and the "issue or children" of his five Sons, to include their illegitimate children, and the Appellant is, therefore entitled to a moiety of the fifth share of the estate of Colonel *Skinner* under that devise. We submit, that from the peculiar circumstances in this case Colonel *Skinner's* Will is not to be construed according to the technical rules of English law as applied to Wills made in this country, and that the construction as to children, as a class, cannot be imported into such a Will as this. The fact of the Will being made in the English form is not a sufficient

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ground for treating the rights of the parties as being governed by the English law. The ruling authority is *Abraham* v. *Abraham* (1), a case decided in this Court, where the *status* of native Christians, known as "East Indians," in the *Mofussil*, and their rights, were fully considered. That case was from *Madras*, and it was held, that *Mad.* Reg. II. of 1802, sec. XVII., which enacts, that in cases where no specific rule exists the Judge is to act according to "justice, equity, and good conscience," was applicable in a case of succession to the estate of a deceased of pure Hindoo blood who had married a European Wife, professing with his family the Christian religion; and the case was decided, not according to Hindoo law, but according to the usages of the class and family to which the deceased attached himself, and to which he belonged. This rule first occurs in *Ben.* Reg. III. of 1793, sec. 21, which enacts "that in cases coming within the jurisdiction of *Zillah* and Civil Courts for which no specific rule may exist, the Judges are to act according to justice, equity, and good conscience:" Act, No. 26 of 1854. [LORD WESTBURY:—The *status* of the Testator, Colonel *Skinner*, will determine the law of construction to be applied to his Will.] His domicil was the *North-Western Provinces of India*, and there is no particular law of that domicil applicable to this case. The *Indian Succession Act*, No. X. of 1865, shews the state of society in *India*, and the effect of having acquired the reputation of being legitimate; sec. 87 enacts, that in the absence of any intimation to the contrary the term "child," "Son," or "Daughter," where there is no legitimate relative, is to be understood as legitimate relative, or the person who has acquired, at the date of the Will, the reputation of being such relative. The principle of English law excluding illegitimate children as a class under a gift to children cannot be applied as a rule of "justice, equity, and good conscience," to which the Courts of Colonel *Skinner's* domicil, in the absence of any particular law, are to have recourse. In order to arrive at the true construction to be put on this Will we must look to the habits, condition, and *status* of the Testator. He was himself illegitimate. [LORD WESTBURY:—That fact is assumed; it is not pleaded.] The effect of Colonel *Skinner's* Will is to give his five Sons an estate for life, with remainder to their issue as tenants in common. The intention

(1) 9 Moore's Ind. App. Cases, 195.

which the Testator had in view in using the words "issue or children" is manifest. In directing that in the event of any of his Sons dying, and leaving "issue or children," the share of the Fathers should devolve on the "issue or children," he meant children in the wider natural sense, and not strictly legitimate children. [LORD WESTBURY:—The words are "all my surviving children." Is there anything in the Will that will justify us in construing that as including illegitimate children?] After providing for the division of his estate among his male issue, he bequeaths it to his Daughters and Granddaughter *Sophia*, the Respondent, Mrs. *Orde*, by name, and to the collateral issue of his Brother *Robert*. It is to be observed, that the Respondent *Orde* is the only child born in wedlock, yet he gives her no preference over the children of *Robert*, who are all illegitimate, as he bequeaths the property to them in "equal shares." It would appear as if the Testator disregarded the illegitimacy of his Sons' offspring, but scrupulously barred the succession of other than his Daughters' legitimate offspring. The fact that on the death of *Joseph Skinner*, *George*, his illegitimate child, succeeded, is strongly in favour of our contention. The evil of recognising illegitimacy was never contemplated by Colonel *Skinner*.

As to the second question, there exist no grounds to support the claim that the property acquired after Colonel *Skinner's* death has become by accretion an integral part of the original estate of Colonel *Skinner*: *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1), which was recognised in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (2), and *Bissonauth Chunder* v. *Sreemutty Bamasoondery Dossee* (3). The Court below rightly distinguished between the estates and property purchased, or otherwise acquired, by the five Sons subsequent to Colonel *Skinner's* death and the original property and estate devised by his Will; and it was competent to each of his Sons to alienate, and consequently it was competent to Major *Skinner* to devise, his undivided one-fifth share of such purchased property which, we submit, passed by his Will to the Appellant and her infant Son as the Devisees therein named.

(1) 6 Moore's Ind. App. Cases, 526; and see 9 Moore's Ind. App. Cases, 123.
(2) 8 Moore's Ind. App. Cases, 66.
(3) 12 Moore's Ind. App. Cases, 41.

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Mr. *Pontifex*, and Mr. *Nasmith* (Mr. *Pritchard*, with them), for the Respondent, *Orde*:—

According to the true construction of the Will of Colonel *Skinner*, illegitimate issue are excluded from inheritance, and the Judicial Commissioner correctly interpreted such Will to that effect. If the *status* of Colonel *Skinner* and his family be considered in its proper view, as representatives of a class of British subjects known as "East Indians," the case of *Abraham* v. *Abraham* (1) is in our favour. In that case the parties were pure Hindoos, who had adopted Christianity, and this Court held, that the Hindoo law did not apply; *à fortiori* in this case the English law applies. If the English law is not to govern the rule of construction, what law is? Colonel *Skinner's* Sons were not Hindoos. The custom of a family is not to be taken into consideration in violation of law. We submit, that the principles upon which English Courts exclude illegitimate children, although recognised by the Testator, when the devise is to children as a class, apply. The English rule is not a technical one, but reasonable, and it is clear that designation is necessary. *Godfrey* v. *Davis* (2) is an authority to shew, that an illegitimate child is not entitled under the description of a "child" in a Will, though the Testator knew the state of the family,—that there were several illegitimate and no legitimate children. So in *In re Standley's Estate* (3), illegitimate children were held not sufficiently designated by the words "next of kin" of another illegitimate child. The Vice-Chancellor *Giffard*, in *In re Wells' Estate* (4), followed the last case. There a Testator, by his Will, after a gift to his Son *T.* (who was illegitimate), directed the division of his estate into seven parts, one of which was given to his Widow, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them "among all my children living at my decease, except my Son *T.*" The Testator left seven children, of whom five were legitimate, two (*T.* and *A.*) illegitimate, and it was held, that *A.* was not entitled to a share as one of Testator's children (5). The contention of the Appellant, that the

(1) 9 Moore's Ind. App. Cases, 195, 241.

(2) 6 Ves. 43.

(3) Law Rep. 5 Eq. 303.

(4) Ibid. 6 Eq. 599.

(5) See also *Howarth* v. *Mills* (Law

technicalities of construction applied to English Wills ought not to be imported into Indian Wills, as it is based on the assumption that the rule excluding illegitimate children as a class when described as "children" is a mere arbitrary rule of construction, is unfounded, as the rule is founded on public policy, and not confined to *England*. [SIR JAMES COLVILE:—In the case of *Her Majesty's Procureur* v. *Bruneau* (1), from the *Mauritius*, their Lordships held, that the word "*descendants*" in Art. 766 of the *Code Civil* of *France* was not limited alone to legitimate descendants, but included illegitimate issue.] Here the devise by the Will of Colonel *Skinner* is not to illegitimate children, but to the legitimate children of his five Sons, as tenants in common for life. Major *Skinner* left a legitimate child and an illegitimate child, and made a Will giving to them what share he had in his Father's estate and subsequently acquired property, which he had no power to do. *Cooper* v. *Cooper* (2) was a case upon the construction of a Will. There Testator bequeathed his residuary personalty between his four children, whom he named, to be equally divided between them, share and share alike; and in case of the death of either of them leaving issue the issue of such child was to take the parent's share; but in the event of their dying without leaving issue, then the share or shares of one so dying to form part of the residue; and the Vice-Chancellor *Wood* held, that the Testator's children took for their respective lives only. This case is referred to, as well as the case of *Gosling* v. *Townshend* (3), in *Hawkins'* Treatise on the Construction of Wills, p. 259. It cannot be denied, that existing illegitimate children may take as *personæ designatæ*, but it is equally clear, that illegitimate children born after the death of a Testator cannot be recognised by him and specially designated. In *Blodwell* v. *Edwards* (4) it was held, that a remainder to a Bas-

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Rep. 2 Eq. 389). In that case, there was a bequest by a single woman, who had gone through the ceremony of marriage with her deceased Sister's Husband, in favour of her children, "legitimate or otherwise." At the date of the Will she had one child living, and several were born afterwards; and the Vice-Chancellor *Wood* held, that the after-born children were excluded, and that the gift enured to the benefit only of the child living at the date of the Will.

(1) Law Rep. 1 P. C. 169.
(2) 2 K. & J. 658.
(3) 17 Beav. 245.
(4) Cro. Eliz. 509.

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tard not *in esse* was void, and that case was acted upon in *Lomax* v. *Wright* (1). There, by deed, an estate was limited to an after-born illegitimate Son in fee; and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant; and an after-born illegitimate Son attained the age of twenty-one, and it was declared, that the last limitation failed, and that the devised estate resulted to the heir of the Grantor. [LORD WESTBURY:—But for the rule of religion, the term "children" would be flexible, and would extend to unlawful as well as lawful children.] No case can be found in which even existing illegitimate children have been admitted to take with legitimate children. Irrespective of the rule of public policy recognised by the English law, we submit, that according to the actual intention of the Testator, illegitimate issue are not included. The use of the term "lawful" as applied to the female issue is not sufficient to warrant the conclusion that the omission of that term in other parts of the Will implies a recognition of illegitimate issue as regards the male branch of the family. The general tenor of the Will is opposed to a construction of the word "issue" as including illegitimate issue, and the passage containing the word "lawful" does not furnish any ground for presuming the Testator's intention of including them.

The next point taken by the Appellant is, whether property subsequently acquired is to be considered as an accretion to the joint estate, and at the disposal of the co-sharers; we submit that it is to be considered as an accretion. The estate was a joint concern. The leases granted to Colonel *Skinner* by Government of certain villages and lands expired at the death of the Colonel, and although they were renewed to the Devisees, yet such renewed leases were obtained by virtue of the original ownership of the devised estates, and in equity are subject to the gifts made by the Will of the devised estates.

Mr. *J. D. Bell*, for the Respondent, *Alexander Skinner*:—

With respect to this Respondent the plaint was improperly framed, and he ought not to have been made a party. His rights cannot be concluded by the decree made in the suit. Upon the

(1) 2 My. & K. 775.

merits I submit, first, that Major *Skinner* had no power by Will to alienate, affect, or incumber any of the property derived by him from his Father, Colonel *Skinner*, or, secondly, by Major *Skinner*, with respect to property acquired subsequently to his Father's death, conjointly with the other members of the family. Whatever may be the rights of the infant, *James Skinner*, and the Respondent, *Orde*, to share between them the estate of Major *Skinner*, such right accrued to them under the Will of Colonel *Skinner*, independently of the Will of Major *Skinner*, and the Appellant has no right to any portion thereof. As to costs, it is clear that the Court below was wrong in ordering costs to be paid by this Respondent; on the contrary, being improperly made a party, he was entitled to costs.

Mr. *Leith*, in reply:—

The domicil of Colonel *Skinner*, himself an illegitimate child, was the *North-Western Provinces of India*, which, at the time of his decease were part of the territory of the *East India Company*, since annexed to the *Punjaub*. All the Devisees of the original Testator and their children, with the exception of Mrs. *Orde*, were illegitimate; and it is clear, in a question of construction of Colonel *Skinner's* Will, that when he used the words "my children," he meant his "illegitimate children." The general principles of construction, in respect to the meaning of the words "issue" and "children," in the authorities cited, so far as relates to illegitimate children not taking as a class, do not apply to this case. The Will itself was never proved, in the sense in which an English Will would be proved in *England*. The *status* of Colonel *Skinner* was not one to which the technical rules of English law applied; on the contrary, the Regulation and Act of the Indian Legislature provide for such a case as the present, when it declares that the Court is to determine "according to justice, equity, and good conscience." *Rajah Burrodicaunt Roy* v. *Bisnosoondery Dabee* (1) was a case of a mortgage by Hindoos of lands in the *Mofussil*, and the Supreme Court at *Calcutta* held that the mortgage deed was to be governed by the Hindoo law, although the conveyance was in the English form.

(1) Morton's Dec. Sup. Court, Calcutta, 91–3.

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At the conclusion of the arguments the case stood over for consideration; their Lordships' judgment was now pronounced by

LORD WESTBURY:—

The question in this appeal depends on the construction and legal effect of the Will of Colonel *James Skinner*, who was an Officer in the service of the *East India Company*.

Colonel *Skinner* died in the month of December, 1841, and at the time of his death he was resident and domiciled in the *Delhi* territory, which then formed part of the *North-Western Provinces of India*, but which, after the mutiny, was placed under the administration of the *Punjaub* Government.

The construction and effect of the Will, therefore, must depend on the law of the domicil, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the Province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion.

Thus the succession of an Hindoo would, as a general rule, fall to be regulated by Hindoo law, and of a Mahomedan by Mahommedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the Province were to act according to justice, equity, and good conscience.

Such is the substance of the Regulations (as explained in the case of *Abraham* v. *Abraham* (1),) which were made by the *East India Company* for defining the jurisdiction of the Courts of the Province in which Colonel *Skinner* was domiciled, and which were in force at the time of his decease.

There is little evidence from which the personal state of Colonel *Skinner* may be ascertained, beyond that which is afforded by the Will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by an European Father.

(1) 9 Moore's Ind. App. Cases, 195.

As a Commander of a corps of irregular light Horse he acquired great distinction in the Military service of the *East India Company*, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the *North-Western Provinces*, and partly in the Territory of *Delhi*.

The form of a renewed grant of some of these estates made to Colonel *Skinner* by the Marquis of *Hastings* when Governor-General, may be material to be noticed. The grant was made to the Colonel in "*Altumgah*" to take effect from the beginning of the year 1226 *Fuslee* era, and contained this special form of limitation, viz.:—"To Colonel *Skinner* and his heirs after him, or to such persons as he may devise by his last Will and testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share shall conform himself to the dispositions of the said Will." Had the grant been simply to the Colonel and his heirs in "*Altumgah*," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the superadded special power of testamentary disposition, therefore, is regarded as an indication that the Grantee was conscious that he was not likely to leave lawful issue, and, therefore, obtained the grant of a power of disposition. This argument, however, is not of much weight. Colonel *Skinner* does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he cohabited and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown; being illegitimate, he belonged to no family, and all that can be collected is, that he was probably a Soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the *East India Company*.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's Will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

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In English law there is a technical rule of construction, that under a testamentary gift of children as a class, illegitimate children, although recognised by a Testator in his lifetime, cannot be permitted to share jointly with natural lawful children; and the Respondents contend, that this rule is applicable to the construction of the Will of Colonel *Skinner:* but, for the reasons we have already given, we are of opinion, that Colonel *Skinner's* succession is not to be administered according to English law, and that there is no room, therefore, for the application of this English rule of construction. The word "children" where it occurs in Colonel *Skinner's* Will, must be taken in that sense, and receive that signification, in which it is plain from the language of the Will, and the dispositions it contains, that it was used by the Testator, that is to say, its extent of meaning in the vocabulary and mind of the Testator must be determined in the Will itself.

The Testator had at the times of making his Will and of his death, five Sons and two Daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel and any one of the Mothers of these children.

All of these Sons and Daughters, however, appear to have been acknowledged by the Testator during his life as his children, and they are expressly called by him in his Will his "Sons and Daughters."

Thus the Will begins with a general gift "to my Sons, *Joseph, James, Hercules, Alexander,* and *Thomas,*" and after giving various pensions to servants and others for life, the Testator directs that they shall revert "to my Sons."

The Sons are again in a subsequent part of the Will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the Testator had a Brother, Major *Robert Skinner,* who, like himself, had never been married, but at the date of the Colonel's Will was dead, leaving several illegitimate children, who had been treated and acknowledged by their Father during his lifetime as his children.

It appears also from the Will of the Colonel, that he had been appointed Trustee or Guardian of these children, and must be

taken to have been well acquainted with their real *status*, or condition of illegitimacy. It is important, therefore, that we find in the Will a devise in certain events "to my late Brother Major *Robert Skinner's* children and their issues in equal shares."

Here the illegitimate offspring of Major *Robert* are called his children, and are associated as tenants in common with the Testator's Daughters and Grand-daughter and their lawful issues.

The correctness of the interpretation which we put on the word "children" in this Will, as denoting the offspring of Sons, is much confirmed by the fact that there is a marked change of expression in the Will when the Colonel speaks of the issue of his Daughters.

It is natural to suppose that he would shrink from the thought of his Daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly, when he provides for the event of the death of all his reputed children (meaning his five Sons) without issue or children, and directs that the property given to them shall devolve to his Daughters, *Louisa* and *Elizabeth*, and his granddaughter, *Sophy* (who was born in wedlock), or their lawful issues, we find a remarkable change of expression which is not to be found in any of the gifts to the children or issue of his Sons.

It appears also from the evidence that the Colonel's eldest Son, *Joseph* (who died in the year 1855), had no lawful issue, but had one illegitimate Son, named *George*, who was born some years before the death of the Colonel, and was always recognised and treated by the Testator as his Grandson; and it is also proved that on the death of his Father, *Joseph*, *George*—this reputed Son—was permitted to succeed his Father, and has, in fact, taken the share devised to *Joseph* by the Will.

The limited signification which in our law is put upon the word "children," when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the *criteria* of this condition are, the being born of a wedded Wife or Wives, or, if born of other women, the being recognised and acknowledged as children by the Father.

With regard to his Sons, the Colonel probably felt the same

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indifference as to their being married or not, which he had shewn in his own case.

The conclusion, therefore, at which their Lordships have arrived is, that the word "children" in the Will of Colonel *Skinner* denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative Father.

We proceed to apply this conclusion to the case which is before us, and which arises on the following clause in the Testator's Will: "I will and declare that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner* dying and leaving issue or children, that the share of the Fathers shall devolve on the issue or children, to be by them divided in equal shares." As has been already stated, the first Son, *Joseph*, died intestate in the year 1855, without lawful issue, but leaving an illegitimate son, *George*, who, with the assent of the majority of his Uncles, succeeded to his Father's share under the devise.

James, the second Son, died in the year 1861, leaving one legitimate Daughter, *Sophia Orde*, and an illegitimate Son, *James Skinner;* and the question is, whether the share of *James*, the Father, in the property devised to his five Sons by the Will of Colonel *Skinner* vests, as to the share of *James*, in his Daughter *Sophia* exclusively, or in the said Daughter and the Son *James*, as tenants in common. For the reasons we have already given, we are of opinion, that the share of the Son *James* belongs to *Sophia Orde* and *James* the Son equally as tenants in common. *James* is named and described as his Son in the Will of his Father *James*, and, therefore, there is a natural equality of *status* between him and his Sister, Mrs. *Orde*, and both take equally under the aforesaid gift made by the Will of their natural Grandfather.

The next and subordinate question in this appeal relates to the Will and succession of *James*, the second Son of the Testator.

By his Will, dated the 10th of November, 1859, after devising all his share of the landed interests devised to him by the Will of his late Father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money Bonds, or other securities,

unto his Daughter, Mrs. *Sophia Evelina Orde*, and his Son, *James*, to be equally divided, the Will contains the following passage :— "As my son *James* is not educated or otherwise provided for, I leave and bequeath to him and to his Mother, *Fanny Barlow, alias Villaetee Begum*, the whole of the villages, landed property, &c., &c. &c., which have been purchased for the estate since the late Colonel *Skinner's* demise, and in which I have a fifth share, as also my house, out-offices, and other lands at *Hausee*."

The question between the Appellant and Respondents is, What property passed under this last devise?

The facts, although they are not very clearly stated, appear to be, that whilst the estates devised by the Colonel to his Sons were under the management of the Executors or Managers appointed by the Colonel's Will, considerable sums, being surplus rents of the devised estates, but not drawn by the Devisees, the Sons, were laid out in the purchase of additional landed property; and it is contended by the Respondents, that these new acquisitions must be regarded in law as accretions to the original devised estates, and as passing with them under the gifts made by the Will.

If this were so, the share of *James*, the Son, in the purchased estates would be divisible, like his share in the original estates, between his Daughter, Mrs. *Orde*, and his Son, *James*, under the Colonel's Will, and would not pass under the devise contained in his own Will.

But their Lordships find no ground for this conclusion, and they are of opinion, that the purchased estates follow the ownership of the purchase-money, which was the absolute property of the five Sons in equal shares; and they are of opinion, therefore, that the Testator *James's* fifth share in these purchased estates passed under the aforesaid devise in his Will.

But another question was raised at the Bar by the Respondents' Counsel, who stated that some leases granted to Colonel *Skinner* by the Government of certain villages and lands expired at the death of the Colonel, and that renewals were made by the Government to the Colonel's Devisees, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must, therefore, in equity be subject to the gifts made by the Will of the devised estates.

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It was incumbent on the Respondents to have stated and proved the facts on which this claim is founded, so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the Courts below.

If, however, Mrs. *Sophia Orde* requests, and is content to take at her own risk, an inquiry on this subject, their Lordships will recommend that such inquiry shall form part of the Order to be made. Their Lordships will humbly recommend Her Majesty to reverse the decree appealed from, and to declare that Mrs. *Sophia Orde* and *James*, the Son and Daughter of Major *James Skinner*, are entitled in equal shares, by virtue of the Will of Colonel *Skinner*, to one equal fifth part of all the estates and property thereby devised and bequeathed to the Testator's five Sons in equal shares, and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel by means of the rents, profits, or income arising from the estates and property devised and bequeathed to the said five Sons of the Testator, belonged absolutely to his second Son, *James Skinner*, and passed, under the Will of the last-named *James*, to Mrs. *Fanny Barlow* and his Son *James* absolutely in equal shares; and at the request and risk of Mrs. *Sophia Orde*, let an inquiry be made, by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his lifetime were made or granted by the Government or any other persons to the Executors or Managers of the Colonel's Will, and under what circumstances, and for what consideration, the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of this first Court on the matters in question Mrs. *Orde* appealed, and obtained a judgment with costs, from which the present appeal is brought. In the opinion of their Lordships, Mrs. *Orde* was wrong on both points; and further in contending that the fifth share of her Father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of *George*, the illegitimate Son of *Joseph*. Their Lordships see no reason, therefore, why the ordinary rule

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should not prevail. The difficulty has arisen, not from any uncertainty in the language of the Colonel's Will, but from the contention of Mrs. *Orde* that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. *Orde* to pay the Appellant's costs in the Court below, the judgment of which is hereby reversed, and also to pay the Appellant's costs of this appeal. No Order is made as to the costs of the Respondent, *Alexander Skinner*.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondent *Orde: Cunliffe & Beaumont.*
Solicitor for the Respondent *Alexander Skinner: W. Tayler.*

In re NORMAND'S PATENT.

J. C.*
1870
Feb. 7.

Letters Patent—Prolongation of term—Foreign Patent for the same invention not expired—Assignee of Patentee—Merits.

A Patentee, a Foreigner, patented his invention first in *England* and afterwards in *France*, which latter patent, at the date of the application for a prolongation of the English patent, had a year to run:—*Held* by the Judicial Committee, that they could not recommend the Crown to extend the term upon the chance of the French patent being extended:

Held, further, that if the French patent had expired there was no power in the Committee to recommend an extension of the English patent.

On the merits, *held*, that an Assignee of the Patentee who had taken an assignment of four-fifths of the patent within a few months of the expiration of a patent, which had only just been brought into use, for a small consideration, was not entitled to any extension.

4 PC 88, 95 71

THE Petitioner, *Thomas Davison*, of the City of *Glasgow*, Engineer, was the Assignee of the Patentee, *Normand*, a native of *France*, and applied for an extension of the term of Letters Patent granted to *Normand*, for "improvements in the treatment and employment of steam in Steam engines, and in the apparatus for effecting the condensation of steam." The patent was dated the 17th of March, 1856.

The Petition alleged, that in the working of Steam engines it was found that the water of the Boiler, when in a state of ebullition, has a tendency to pass over from the Boiler with the steam into the

* *Present*:—THE LORD JUSTICE GIFFARD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

J. C. 1870 *In re* NORMAND'S PATENT.

cylinder, producing the injurious effect usually termed priming; that various attempts had been made to cure the defect of priming in Steam engines, but that, prior to the date of the above Letters Patent, none of the expedients employed could be used with practical success, owing to the trouble and expense attending their use. That the Patentee's improvements completely remedied the defect in the most efficient and economical manner; that there was another important improvement by keeping hot the pistons of Steam engines, especially those of improved construction now in use, which prevented the loss of steam, and obtained the greatest possible result with the expenditure of the least possible amount of steam, and the least possible consumption of fuel. That at the date of the Letters Patent the Patentee was not able to bring his improvements into general use, because as Engines were then commonly built and used they could do without them; that now the demand for Engines of an improved construction, especially those of the class called compound engines, which were rendered efficient to a considerable extent by the adoption of the Patentee's improvements, had led to a more general use of them under the supervision and constant attention of the Petitioner, and that a very large saving in the consumption of fuel had been already effected. That the expenses incurred by the Patentee in endeavouring to introduce his invention, and by the Petitioner, as the Assignee of the patent, had been large, and that a considerable portion of the term of the patent had been, in effect, lost before it was possible to make the invention generally known, or to bring it into practical operation, and that it was only recently that any adequate remuneration had begun to be derived from the use of the invention; that neither the Patentee nor the Petitioner had received any adequate remuneration, but that there was now a reasonable expectation that the difficulties that had been encountered in bringing the invention into operation were removed, and the Petitioner prayed for a prolongation of the term for fourteen years.

It appeared that the Patentee, subsequent to the date of his English patent, had procured Letters Patent, dated the 26th of June, 1856, for fifteen years, for the same invention in *France*, and the French patent had not, therefore, yet expired, having upwards of a year to run.

Evidence was given as to the utility of the invention, and that until the last two or three years it had not been brought into use, during which time twenty-three Ships, including Ships of the Royal Navy, had been fitted up with the Patentee's invention, causing a saving, as alleged, of about £10,000. It also appeared, that the Patentee had, eleven months before the expiration of the patent, by deed, assigned four-fifths of the patent rights to the Petitioner for the sum of £50. The accounts produced were incomplete, but they shewed an expenditure of £75 by the Petitioner in efforts in bringing the patent into use.

Mr. *Aston*, for the Petitioner.

Mr. *Archibald*, for the Crown, submitted:—

That there were no merits to entitle the Petitioner, an Assignee, to an extension of the term of the patent. That it was only on a strong case that this Tribunal will put in force the provisions of the 7 & 8 Vict. c. 69, s. 4, in respect to an extension to Assignees of Patentees: *In re Norton's Patent* (1). That the consideration-money paid by the Assignee being only £50 for four-fifths of the patent, and that within a few months of the expiration of the patent, the Petitioner, as such Assignee, had not incurred any such expense or risk in bringing the invention into use as to entitle him to the indulgence asked for; and, moreover, that the French patent had not expired.

THE LORD JUSTICE GIFFARD:—

In this case there has been no prolongation of the patent in *France*, and, beyond all question, their Lordships cannot recommend to Her Majesty to prolong a patent in *England* upon the chance of its being prolonged in *France*. It is a universal rule, that if a Foreign patent has expired, their Lordships will not recommend a prolongation of the term of the same patent in *England* (2); but when we take the matter into consideration at the outset we find, that until nearly the expiration of the English patent there has been nothing done at all, and there has been an

4 PC 97

(1) 1 Moore's P. C. Cases (N.S.) 339.

(2) See *Bett's Patent*, 1 Moore's P. C. Cases (N.S.) 49; *In re Hill's Patent*, Ibid. p. 258; *In re Poole's Patent*, Law Rep. 1 P. C. 514; and 15 & 16 Vict. c. 83, s. 25.

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assignment of the patent for the sum of £50, more than the whole of which sum has been received back by the Assignee; and besides that, the only consideration is, that the Assignee is to take four-fifths of the patent, and the Patentee is to take one-fifth. That being so, the only merit on the part of the Assignee in applying for an extension of the term would have been great expenditure by him; but there has really been no expenditure at all by the Assignee.

Under these circumstances, their Lordships have come to the conclusion, that they cannot advise a prolongation of this patent. In point of fact, their Lordships do not hesitate to say, that if this patent were prolonged there is no patent which has not come into use till nearly its expiration which might not be prolonged; besides that, their Lordships are of opinion, that they cannot proceed upon the accounts, which are mere estimates, for as to the real expenditure upon this patent no sufficient statement or account has been given.

Solicitor for the Petitioner: *Bristow Hunt.*
Solicitors to the Treasury, for the Crown.

J. C.* 1870 *Feb.* 28.

HENRY BULKELEY AND ANOTHER . . . APPELLANTS;

AND

HENRY GERALD SCUTZ AND ANOTHER . RESPONDENTS.

IN AN APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Practice—Special leave to appeal—Petition—Averment—Misstatement of fact—Order for leave to appeal rescinded.

Special leave to appeal having been given on an *ex parte* application, and upon an erroneous statement contained in the Petition for leave: the Order allowing such leave discharged with costs.

THIS was an application to rescind an Order made on the 5th of February, 1870, by Her Majesty in Council, granting special

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE, and THE LORD JUSTICE GIFFARD.

SC on merits post 762.

leave to the Appellants to prosecute an appeal from an Order of the Supreme Consular Court of *Constantinople*, of the 31st of December, 1867, under the following circumstances:—

The Appellants were Defendants in a suit originally instituted in the Consular Court for *Egypt* against them, as Directors and Managers of the *Ramle Railway Company*, for an account, and other relief, by the Respondents, the Plaintiffs. Various proceedings were had in the suit, and Orders made, some of which were appealed from to the Supreme Court at *Constantinople*: and one of which, made on the 5th of October, 1869, to Her Majesty in Council. This Order was not, however, prosecuted by reason, as it was alleged in the petition for leave to appeal, that such Order was, in effect, but for the enforcement of a previous Order of the 31st of December, 1867, against which it was, in the Petition to rescind, stated that the Appellants had not made application to the Supreme Court in due time, and had not obtained leave to appeal therefrom to Her Majesty in Council. Upon which statement, and the merits disclosed by the petition, the Order giving leave to appeal of the 5th of February, 1870, was made.

It appeared from the petition to rescind the Order, that the allegation contained in the Appellant's petition relative to the Order of the Supreme Court of the 31st of December, 1867, was incorrect, and that the fact was, that leave to appeal from that Order to Her Majesty in Council had been at the date thereof made in due time, and such leave granted, but that the appeal had not been duly prosecuted.

Mr. *Layon*,

Moved, on behalf of the Respondents, to dismiss the Order of the 5th of February, 1870, giving leave to appeal, on the ground that such Order was obtained *ex parte*, and on an allegation that was contrary to the fact, leave having been asked for and obtained from the Supreme Consular Court to appeal to Her Majesty in Council from the Order of the 31st of December, 1867.

Mr. *Bunting*

Appeared for the Appellants, and admitted the mis-statement, but submitting that as it arose inadvertently, and from the mistake

J. C. 1870 BULKELEY v. SCUTZ.

of the parties in this country assuming that as no appeal had been prosecuted, no appeal from the Order of the 31st of December, 1867, had been allowed.

THE LORD JUSTICE GIFFARD :—

Their Lordships have, in such circumstances as are here disclosed, but one course to pursue. The Order of the 5th of February, 1870, allowing leave to appeal, was obtained *ex parte*, and upon a misrepresentation of the facts of the case. It was alleged in the petition for special leave to appeal that the Petitioners had inadvertently omitted to apply to the Supreme Consular Court for leave to appeal to Her Majesty in Council from the Order of the 31st of December, 1867. It now appears, and is admitted by the Appellants' Counsel, that leave to appeal to Her Majesty in Council was applied for and obtained from the Supreme Court at the date of this Order ; and their Lordships are quite ready to admit, that the error in the statement of the facts has arisen from the cause suggested, and was a mistake on the part of those prosecuting the appeal in this country; but they have but one course open to them, which is to advise Her Majesty to rescind the Order of the 5th of February, 1870, giving leave to appeal, and to grant the present application with costs (1).

Solicitors for the Appellants : *W. & H. P. Sharp.*
Solicitor for the Respondents : *T. R. Kent.*

(1) See *Wilson* v. *Callender*, 9 Moore's P. C. Cases, 100 ; and *Sibnarain Ghose* v. *Hullodhur Doss*, Ibid. 354.

CHARLES BARRON AND THOMAS HARRISON . . . . . } APPELLANTS;

AND

GEORGE CHARLES STEWART . . . . RESPONDENT.

J. C.*
1870
June 20.

THE "PANAMA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Bottomry Bond—Notice by Master before resorting to—Owner's alleged Insolvency no excuse—Mortgagee.

Before resorting to Bottomry for raising necessary supplies, it is absolutely necessary (where practical) that notice should be given by the Master to the Owner of the Vessel, and an allegation that such Owner was Insolvent is no excuse for not communicating to him, unless he has been judicially declared Insolvent, and the ownership of the Vessel vested in his Assignees, to whom such notice must then be given.

Semble:—Notice to the Mortgagee of the Vessel in such circumstances, would not suffice.

THIS was a cause of Bottomry by the Appellants against the Vessel *Panama*, and her freight.

The circumstances of the case were shortly these:—

The *Panama* was a Vessel belonging to one *Fincham*, who resided at *Liverpool*. She was chartered by the Appellants, Shipbrokers at *Liverpool*, to proceed on a voyage from *Liverpool* to *Cuba* and back. By the terms of the charterparty no freight was to be paid on the outward cargo, but the freight was to be paid on the homeward cargo. A sum of £500 was to be advanced in this Country, and *Fincham* was to give a second mortgage on the *Panama* for securing such advance, which he accordingly did. The Master, *Mantle*, was to have sufficient funds, not exceeding £250, advanced to him by the Charterers' Agents at *Cuba* for the ordinary disbursements of the Ship.

The *Panama* proceeded on her voyage, and on the 27th of July,

* *Present*:—THE MASTER OF THE ROLLS (LORD ROMILLY), SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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1868, arrived at *Cardenas*, a port in *Cuba*, and there discharged her outward cargo. She was consigned to Messrs. *Finlay & Co.* of *Havana*, the Agents of the Appellants, and by the authority of such Agents the *Panama* was sub-chartered on account of the Appellants to go to *Trinidad de Cuba*, a port on the south side of the Island, and there take in a cargo for this Country.

The sum of £250, as provided by the charterparty, was advanced to the Master of the *Panama* by the Agents of the Appellants, and they made a further advance to him of a further sum of £250.

The *Panama* proceeded to *Trinidad de Cuba*, and arrived there about the middle of September, 1868, and proceeded to take in her cargo. At this port the Master of the *Panama* gave a Bottomry Bond on the *Panama* to secure payment of a sum of £265. 13*s.* 4*d.*, with 20 per cent. premium, making together the sum of £318. 16*s.* This Bond, which was dated the 9th of October, 1868, was granted by the Master without any previous communication with the Owner of the *Panama*. The Appellants were the real takers of the Bond, the name of *Don Felix de la Vega* being inserted in such Bond as a Trustee for the Appellants.

The *Panama* left *Trinidad de Cuba* for *London*, but met with bad weather, and, having lost some of her sails and damaged some stores, put into *Cardenas*. The Master of the *Panama* then intimated his intention to sell a part of the cargo in order to raise funds. Upon receiving this intimation, the Appellants' Agents, Messrs. *Finlay & Co.*, on the 24th of November, 1868, sent the following Telegram to the Appellants:—"*Panama* wants £200 to clear, also £160 claimed by *Mantle* for wages; are ready to advance all, but he must leave Vessel to Captain appointed by Consul. See Owner. Answer."

On the following day, the Appellants sent in answer the following Telegram to *Finlay & Co.*:—"Do best—our interest; appoint new Master; secure advance; Bottomry."

On the receipt of this Telegram, *Finlay & Co.*, with the assistance of the British Consul at *Havana*, removed *Mantle* and put another Master in his place, but before *Mantle* left they got him to sign a Bottomry Bond in their favour for the sum of £741. 12*s.* This amount was made up as follows, viz.: £378. 3*s.*

fresh advance, with £113. 9*s.*, being 30 per cent. premium thereon, and the sum of £250 which *Finlay & Co.* had previously advanced to Captain *Mantle* over and above the £250 which was to be advanced according to the charterparty.

Messrs. *Finlay & Co.* made the advance of £378. 3*s.*, and took the Bond as Agents for the Appellants.

No communication or attempt to communicate with the Owner of the *Panama* was made by the Master of the *Panama*, save by the aforesaid Telegram, before he granted the Bond.

Fincham, the Owner of the *Panama*, was resident at *Liverpool* at the time when the Telegram arrived from *Havana*. The Respondent was, as the Appellants were aware, first Mortgagee of the *Panama* for a large amount, and he also was resident at *Liverpool*, but the Appellants did not attempt to communicate with him on the subject.

The Appellants originally proceeded on both the Bonds. The Owners of the *Panama* did not dispute the Bonds, but their validity was contested by the Respondent, and the Bonds were referred to the Registrar to report thereon, without prejudice to any question as to their validity.

Upon the reference the Appellants abandoned the first Bond, and proceeded only upon the second Bond.

At the reference, a correspondence between the Appellants and their Agents, Messrs. *Finlay & Co.*, was put in evidence by the Appellants, and from such correspondence, and also from the evidence of the Appellant, *Barron*, who was examined as a witness, it appeared, that at the time when the Appellants chartered the *Panama* they had, without informing *Fincham*, the Owner, instructed their Agents, Messrs. *Finlay & Co.*, to make advances on Bottomry of the *Panama* on their behalf in case the Master of the *Panama* should be in want of funds, and further, that at the time when, and long before the receipt by them (the Appellants) of the above telegram, they had come to the conclusion that the Master of the *Panama* had been and was grossly misconducting himself.

The Registrar by his report found, that nothing was due upon the second Bond, on the ground that such Bond was invalid because neither the Master nor the Appellants communicated either with

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the Owner of the *Panama* or the Respondent before such Bond was given, and that communication ought to have been made. It was alleged by the Appellants, as a ground for not communicating with the Master, that he was insolvent at the time, but the fact of such insolvency was neither pleaded nor proved.

From this report the Appellants appealed to the Court, but the Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) by his decree made on the 30th of July, 1869, confirmed the Registrar's report (1).

From such decree the present appeal was brought.

Mr. *Butt*, Q.C., and Mr. *Pritchard*, for the Appellants:—

The question raised on this appeal regards the validity of the second Bottomry Bond granted by the Master of the *Panama*. All claim as regarded the first Bond was abandoned when before the Registrar, though the objection there taken to the Bond on the ground that it was taken without notice to *Steward*, the Mortgagee, was made one of the reasons stated by the learned Judge of the Admiralty Court for declaring the second Bond invalid. We admit that there was no direct communication with the Owner of the Vessel before taking the second Bond (2), but the question of communication with the Owner is one which goes only to the authority of the Master to execute the Bond, but the circumstances in which the Master was placed sufficiently authorized him to contract a loan on Bottomry. At the time of the taking the second Bond the Master was aware of the insolvency of the Owner of the Vessel, and that was sufficient to justify him, without waiting for communication with the Owner. But the conduct of the Owner amounted to a ratification of the Master's act in executing the Bond; he took no steps to contest the Bond. The judgment of the Court below was not warranted by the evidence, or the circumstances of the case.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, appeared for the Respondent, but were not called upon.

(1) Law Rep. 2 A. & E. 390.

(2) See *The Bonaparte*, 8 Moore's P. C. Cases, 459; and *The Cargo ex The Hamburg*, 2 Moore's P. C. Cases (N.S.) 289.

THE MASTER OF THE ROLLS :—

The short statement of the case is this :—The Appellants chartered a Vessel ; she got into difficulties and was obliged to go to *Cardenas*, in *Cuba*, on the 12th of October, 1868. When she got there, the Master attempted to raise money, and found that he could not do it, and the Agents of the Charterers in *Cuba* telegraphed to *Liverpool* on the 24th of November to ask what they were to do in the matter. The telegraphic message which they sent is striking upon the only point on which their Lordships' opinion is asked, for it is to this effect,—" *Panama* wants £200 to clear ; also £160 claimed by *Mantle* for wages ; are ready to advance all, but he must leave Vessel to Captain appointed by consul. See Owner. Answer." Well, here is an express direction by the Agents at *Cardenas* to the Charterers to see the Owner, and to take care what answer shall be given. The telegraphic message in answer is sent on the following day :—" Do best—our interest ; appoint new Master ; secure advance ; Bottomry." The Agents were quite ready to advance the money ; but, nevertheless, the Charterers informed them that they must appoint a new Master and raise the money by Bottomry. Instead of complying with the request made by the Agents at *Cuba*, to see the Owner, the Appellants do nothing of the sort, although the Owner was in the same town and apparently attending his office every day, and they might perfectly well have seen him.

Now, their Lordships do not intend to lay down that it is necessary, if the Owner cannot be served with notice, that notice must be given to a Mortgagee ; that question does not arise ; but what they wish to express is, that it was absolutely necessary in this case to give notice to the Owner. The excuse given here is that the Owner was Insolvent. Their Lordships think, that this is not a technical matter, but a matter of substance, and that it is important that the Owner should receive notice, in order to enable him to raise money for the purpose of rescuing his Vessel from its difficulties at a smaller amount of premium than the maritime premium would necessarily entail.

The excuse alleged is, that he was insolvent. Their Lordships think this excuse fails. In the first place, either he had been Insolvent and declared so judicially, or he had not. If he had been

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declared so judicially, the ownership in the Vessel is transferred to other persons, and those persons are the persons who ought to receive notice; and the Assignees would be the persons who might think it for the benefit of the Creditors of the estate that they themselves should supply or obtain the money required.

Neither do their Lordships think that the questions raised respecting the demurrage and the expense afford any excuse in this case; because, if the money were obtained in *Liverpool*, a telegraphic message sent to *Cardenas* would have caused the money to be paid in twenty-four hours.

It resolves itself, therefore, solely into a question of insolvency, and whether insolvency excuses the giving of notice, there having been no judicial insolvency. Their Lordships are of opinion, that if they were to lay down this as a principle, it would produce a serious evil. In the first place, it is very difficult to tell whether a person is insolvent. Is it to depend on the ultimate result of whether he was actually insolvent at the time, and that the opinion of the Charterer was correct? The fact of whether a man is Insolvent or not may depend upon the result of a single item in a contested account, which may involve a question of difficult legal decision. Insolvency, finally, may depend upon the expense of legal proceedings, and the time and manner of realizing the assets. These would have to be taken into account.

Their Lordships are of opinion, that until a person has been judicially declared Insolvent the Owner is the person to receive notice, that he may be able to extricate himself from these difficulties, and that he should duly receive notice of the intention to raise money by Bottomry. In case he is judicially declared insolvent the ownership rests in other persons; but that in no case can a communication of notice be dispensed with.

Their Lordships, therefore, think that the judgment of the Court below is correct, affirming that of the Registrar; and their Lordships are of opinion, that this appeal ought to be dismissed with costs.

Solicitors for the Appellants: *Wright & Venn.*
Proctors for the Respondent: *Clarkson, Son, & Greenwell.*

C. H. MARSHALL & CO., the Owners of the "James Foster, Junior" . . . . . } Appellants;

AND

MORAN, GALLOWAY, & CO., the Owners of the "Ocean Wave" . . . . . } Respondents.

J. C.*
1870
June 20, 21.

THE "OCEAN WAVE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Vessel in tow—Compulsory pilotage—Statute, 17 & 18 Vict. c. 104, s. 388—Owner's exemption.

In a case of damage by collision occasioned by a Vessel while in tow of a Steam-tug, having a licensed Pilot on board, in pursuance of the Statute, 17 & 18 Vict. c. 104, s. 388, and no blame attached to the Master or crew:—*Held*, that the Owners of such Vessel were not liable, being protected by that section of the Statute.

THIS was a cause of damage, instituted on behalf of the Owners of the Vessel, *James Foster, Junior*, against the Vessel, *Ocean Wave*, and against her Owners, the Respondents, intervening, for the recovery of damages sustained by the Appellants by reason of a collision between the two Vessels.

The collision happened at about 9·30 A.M. on the 17th of December, 1869, in the River *Mersey*. The wind at the time was blowing strong from about north-west; the tide was flood, and a little before high water. The *James Foster, Junior*, a Ship of 1,428 tons register, was at anchor, with her head down the river. The *Ocean Wave*, a Ship of about 856 tons, inward bound, with a cargo for *Liverpool*, arrived in the *Mersey* on the previous day, in charge of a duly licensed *Liverpool* Pilot, and was, by his directions, brought to anchor off the *Canada Dock*, considerably lower down the river than the place of the collision.

At about 6·35 on the morning of the collision a Steam-tug, the *Liverpool*, came to take the *Ocean Wave* to the *Brunswick Dock*, and, by order of her Pilot, the anchor of the *Ocean Wave*

* *Present*:—The Master of the Rolls (Lord Romilly), Sir James William Colvile, and Sir Joseph Napier, Bart.

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was got up, and, with the *Liverpool* fast to her ahead, she proceeded to drop up the river stern first. Whilst so dropping up, another Steam-tug, the *Tiger*, was engaged, at the request of the Pilot, to assist in docking the *Ocean Wave*. The *Ocean Wave* proceeded up the east side of the river till she was about off the *Albert Dock*, when she had to get out of the way of a Vessel astern of her, and for that purpose the Tug *Liverpool*, by order of the Pilot, went ahead. The *James Foster, Junior*, had been seen at anchor before this was done, but after it had been done she was about three or four berths off, and to the southward and westward of the *Ocean Wave*. By order of the Pilot the *Liverpool* then proceeded to turn the *Ocean Wave* round towards the *Cheshire* shore under a starboard helm; and it was whilst this manœuvre was being executed that the collision occurred.

The Respondent relied upon two grounds of defence, first, that the collision was the result of inevitable accident; second, that if the collision was not the result of inevitable accident, it was solely occasioned by the default of the Pilot of the *Ocean Wave*, and that the employment of such Pilot having been compulsory, the Respondents were not liable to the Appellants.

The Appellants attributed the collision to the insufficiency of power on the part of the Steam-tug *Liverpool*, and upon that ground contended, that the defence upon the ground of compulsory pilotage could not be sustained, inasmuch as the Respondents ought to have supplied a more powerful Tug.

The cause was heard orally before the Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*), assisted by two of the Elder Brethren of the Trinity Corporation; and he, by his decree, pronounced the collision to have been solely occasioned by the default or incapacity of the Pilot, and dismissed the suit. In his judgment he said, "The Elder Brethren of the Trinity House are of opinion, that it was not wrong to move on that day, but the Pilot ought to have been careful, having regard to the weather and the state of circumstances which I have mentioned, that, if he did move, he moved with sufficient motive power on the part of the Steam-tug; and that it was a wrong exercise of judgment on the part of the Pilot to select the place he did to turn the *Ocean Wave*, having regard to the weather, and also I am

bound to say, having regard to the inadequacy of the Tug *Liverpool* to execute the manœuvre. It is right to say that, upon both grounds, the Elder Brethren think the Pilot erred in his judgment —he erred in ordering the *Ocean Wave* to be turned by the *Liverpool*, of whose power the evidence shews he must have been fully conscious, and as to which there seems to have been no disguise whatever; and if he chose to have the *Ocean Wave* turned with the assistance of a Vessel of the force and power of the *Liverpool*, he erred in ordering that manœuvre to be executed at the time he did order it. That being the opinion of the Elder Brethren, I can come to no other legal conclusion than that the cause of this collision was the wrong order of the Pilot of the *Ocean Wave*, it being borne in mind that, according to the judgment of the Court, the orders of the Pilot were obeyed. I, therefore, for these reasons, must pronounce a decree dismissing the suit, upon the ground that the *Ocean Wave* was, at the time of the collision, under the charge and navigation of a duly licensed Pilot."

The appeal was from this decree.

Mr. *Milward*, Q.C., and Mr. *C. Russell*, for the Appellants:—

To entitle the Respondents, as Owners of the Vessel causing the damage, to exemption from the consequences of the collision, by reason of their having a licensed Pilot on board, the Master and crew must be shewn to be free from all cause conducing to the collision, and that it was occasioned solely and entirely by the fault or neglect of the Pilot. The *onus probandi* is, both by the 6 Geo. 4, c. 125, s. 55, and the 17 & 18 Vict. c. 104, s. 388, on the Respondents to prove affirmatively that fact: *The Schwalbe* (1); *The Christiana* (2); *The Protector* (3); *The Diana* (4); *The Carrier Dove* (5); *The Earl of Auckland* (6); citing *Reg.* v. *Stanton* (7); *The Mobile* (8); *The Admiral Boxer* (9). The evidence shews, that the principal cause of the collision was the inadequacy of the Tug *Liverpool* to perform the required towage services. Such

(1) 14 Moore's P. C. Cases, 241.
(2) 7 Moore's P. C. Cases, 160.
(3) 1 W. Rob. 45.
(4) 4 Moore's P. C. Cases, 11.
(5) 2 Moore's P. C. Cases (N.S.) 260.
(6) Lush. 164, 178.
(7) 8 E. & B. 445.
(8) Swa. 69.
(9) Swa. 193.

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Tug was selected by the Master. It was no part of the statutory duty of the Pilot to select a Tug, and it is in evidence that he did not do so. The selection and hiring was by the Master of the *Ocean Wave*, and the negligence of her towage, which was the cause of the accident, was the consequence of such hiring, and was, therefore, his negligence, and not that of the Pilot, who had nothing to do with the hire of the Tug, or any knowledge of its power or capacity for the duty required. The defence of compulsory pilotage set up by the Respondents cannot prevail, and ought not to have been admitted in the Court below; the Master, on behalf of the Owners, ought to have supplied a more powerful Tug.

Mr. *Butt*, Q.C., and Mr. *Clarkson*, for the Respondents:—

The decree of the Court below is fully sustained by the evidence; the collision was either the result of inevitable accident, or was solely occasioned by the default of the Pilot. The employment of the Pilot was compulsory on the Master and Owners of the *Ocean Wave*, and the Statute, 17 & 18 Vict. c. 104, s. 388, relieves them from liability. If the Tug *Liverpool* was, as alleged, selected and engaged by the Master, the Pilot approved of such selection, and took the command as well of the Tug as the *Ocean Wave;* the Tug and Vessel in tow were as one Vessel, as was held in *The Carrier Dove* (1), relied on by the Appellants.

SIR JAMES W. COLVILE:—

This appeal has been very ably argued, but their Lordships are of opinion, that no sufficient grounds have been laid before them for disturbing the judgment of the Court below.

They are anxious to state that in coming to this conclusion they do not mean to depart in any the slightest degree from the principles established by *The Christiana* (2) and the other cases in which it has been ruled that the Owners of a Vessel who claim the statutory exemption which the law gives at present, when Ships are compelled to take a licensed Pilot on board, must shew that the neglect which has caused the accident was solely that of the Pilot. Nor do their Lordships mean in any degree to affirm the proposition

(1) 2 Moore's P. C. Cases (N.S.) 260. (2) 7 Moore's P. C. Cases, 160.

that if negligence in the selection of the Tug *Liverpool* had in this case been shewn to be wholly or in part the cause of the accident, the Pilot, and not the Master and Owners, would be responsible for that improper selection. But the reasons why they have come to the conclusion that this judgment ought to be affirmed, are simply these:—they are of opinion that it is not shewn upon the evidence that if this Ship, and the Steamer *Liverpool*, which had her in tow, had been properly handled, she might not have been safely brought into dock. Upon the evidence it would appear that the *Liverpool* had been frequently employed in towing Vessels of even greater burthen than the *Ocean Wave*. It is said, no doubt, that this was in fine weather, and there is some evidence that the weather on the occasion in question was squally. It appears, however, to their Lordships that the evidence as to the weather is not such as to shew that the Master was really guilty of any negligence in attempting to have his Vessel taken into dock in tow of the *Liverpool*, and in that opinion they are confirmed by the Nautical Assessors who assist them.

No doubt, in this case, as in every other in which the party sets up an alternative case, the evidence as to the precise character of the negligence does not come out so strongly as it might have done if the parties had come into Court prepared to admit negligence, and to prove that it was solely that of the Pilot. They set up the case of inevitable accident; that case fails, and the evidence upon which it fails discloses a case of negligence on the part of somebody. It then becomes the duty of the Court, which holds that some negligence has been established, to pronounce, upon the particular evidence before it, whose negligence it was, whether it was negligence for which the Pilot was solely responsible, or whether it was negligence for which the Master and Owners were also responsible.

In the present case it seems to their Lordships, and in that opinion they are confirmed by their Nautical Assessors, that, if it be admitted that had these Vessels been properly handled the Ship might have been got safely into dock, the negligence that occasioned the accident must be held to be that of the Pilot. After the Ship was under weigh he clearly was in command. There are two conclusions which may be drawn from the evidence: one, that

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he did not attempt to turn the Ship in proper time, and that he approached too near to the *James Foster, Junior;* the other, that, though he might have turned if he had properly manœuvred his Ship at that spot, he did not make use of the proper manœuvres. Although their Lordships do not mean for one moment to say that for the absolute insufficiency of the Tug he would have been responsible, yet it was clearly his duty, knowing, as he must have known, better even than the Captain, what the powers of the *Liverpool* were, to take his measures and to execute his manœuvres with reference to her motive power. Their Lordships are of opinion, that he might safely have attempted to turn the Vessel earlier than he did. They are also informed by their Assessors that if, when he attempted to turn the Vessel at the spot at which the attempt was in fact made, he had put some head-sail upon the Ship, she would have turned within that space, and that the accident might, in that case, have been avoided. That is a point which, whether taken or not in the Court below, appears to our Assessors to be very important; and, if they are correct in thinking that the head-gear of the Vessel might have been so employed, the omission to take that precaution was clearly an omission of duty on the part of the Pilot, and not one on the part of the Master or crew. The act omitted was involved in the navigation of the Ship. On the other hand, if there was any sufficient reason why the head-gear of the Ship could not be so used, there seems to their Lordships to be no reason for dissenting from the conclusion of the Court below, and that the attempt to turn the Vessel ought to have been made at an earlier period, in which case the Tug would in all probability have succeeded in getting her round.

A great part of the argument on the part of the Appellants has proceeded upon a critical examination of the language of the judgment in the Court below; but to their Lordships it appears that, if the judgment be really closely looked at, it does not in any degree differ from theirs; that the learned Judge below did not really mean to attribute to the Trinity Masters any functions which do not properly belong to them, and that when he speaks of the inadequacy of the Tug, he only means her inadequacy to execute the manœuvre at the particular time and under the particular

circumstances in which the Pilot attempted to execute it. Consequently, their Lordships are of opinion that there is nothing in the judgment of the Court below to lead to the conclusion that it proceeds on the ground that the original fault was in the selection of the Tug, and that that was an act for which the Pilot was to be held solely responsible. They believe that the fault which the judgment meant to impute to the Pilot was an improper handling of the two Vessels, the towing Vessel and the one in tow, having regard to the motive power of the *Liverpool*, the state of the tide, the wind, and the other circumstances of the navigation.

Their Lordships are not insensible to the great hardship which is occasioned to persons in the position of the Owners of the *James Foster, Junior*, who, by reason of the present state of the law, lose their remedy against the Owners, and have only a remedy, which is of course of very little value, against the Pilot; but with that their Lordships have no concern. It is for the Legislature to determine whether the law should be altered or not—upon which of two innocent persons the loss in such cases should fall, whether upon those who are compelled to take a Pilot whom they have no power of selecting, or upon those who are injured by the Ship which has that Pilot on board. The law, as it now stands, has determined that in such cases the Owners of the Vessel which does the damage are exempt from their *primâ facie* liability. Their Lordships can only give effect to the law by a fair application of it to the facts proved before them; and they are of opinion, that this is a case in which the Owners are entitled to exemption.

Their Lordships, therefore, must humbly recommend Her Majesty that this appeal be dismissed with costs.

Solicitors for the Appellants: Messrs. *Gregory, Rowcliffes, & Rawle.*

Proctors for the Respondents: Messrs. *Toller & Sons.*

J. C.* 1870 June 21.

THE OWNERS OF THE STEAMSHIP FENHAM AND OTHERS . . . . . } APPELLANTS;

AND

SURTEES WAKE AND JOHN WAKE AND OTHERS . . . . . } RESPONDENTS.

THE "FENHAM."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Admiralty Regulations regarding lights—Effect of disobedience of—Exemption, when justifiable.

5 Asp Cas 892, 893, 904-8

In a case of collision between a Steamship and Sailing Vessel, occasioned by the fault of the Steamship, it was proved, that the Sailing Vessel had failed to comply with the Admiralty Regulations regarding lights, having either shewn no lights, as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention.

The Judicial Committee reversed the decision of the Admiralty Court, being of opinion, that the collision might have been avoided if the Sailing Vessel had obeyed the Admiralty Regulations, and that though the omission to exhibit proper lights might be immaterial where it is clearly shewn that the absence of such lights was not the cause of the collision, and did not conduce to it, yet that where it is proved, that a Vessel has not shewn proper lights the *onus* lies on such Vessel to shew, that the non-compliance with the Regulation was not the cause of the collision, which the Sailing Vessel failed to do; the general rule being, that a Vessel must not only obey the Admiralty Regulations as regards lights, but must obey them in time to prevent an impending collision.

A CAUSE of damage promoted by the Respondents in consequence of a collision which occurred between the Appellants' Steamship *Fenham* and the Respondents' Brig *Sea Venture*, on the 13th of November, 1869.

The facts were these:—

On the 10th of November, 1869, the *Fenham*, an iron screw Steamship of 567 tons register, worked by engines of 100 horse-power, sailed from *Antwerp* in ballast, bound to *Newcastle-on-Tyne*.

* *Present*:—THE MASTER OF THE ROLLS (LORD ROMILLY), SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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The Steamship prosecuted her voyage without any material occurrence until about 5.20 P.M. of the 13th of November, 1869, when she was about four and a half miles from *Whitby*, the *Whitby Lights* bearing about W.N.W. The *Fenham* was heading N.$\frac{1}{2}$W., and going at the rate of five or six knots an hour. The evening was dull, the weather cloudy, and the wind fresh from about west, and it was nearly low water. The Steamship had her three Admiralty Regulation lights duly exhibited and burning brightly, and a good look-out was being kept on board of her, when a Vessel, which proved to be the Brig *Sea Venture*, was seen by those on board the *Fenham* at the distance of about a quarter of a mile on the starboard bow, and as the Vessel exhibited no lights which were visible, it was concluded by those on board the *Fenham* that she was moving in the same direction, or nearly in the same direction, as the Steamship, and, therefore, no alteration was made in the Steamship's course. But when the *Fenham* approached the Brig she was seen to be a Vessel standing in on the starboard tack, and thereupon the Master of the *Fenham* at once ordered the engines to be reversed full speed, and the helm to be put hard-a-starboard as the only possible means of avoiding a collision. The *Sea Venture*, however, instead of keeping her course, put her helm hard-a-port, and thereupon the *Fenham* ran into the port side of the Brig about amidships. In consequence of the collision the *Sea Venture* foundered, her crew having previously succeeded in getting on board the *Fenham*.

The cause came on for hearing in the Court below, and, after hearing the evidence adduced by the Appellants and Respondents, the Judge (The Right Hon. Sir *Robert Phillimore*), following the opinion of the Trinity Masters, pronounced the *Fenham* alone to blame for the collision, and decreed accordingly.

From this judgment the Appellants appealed.

Mr. *Milward*, Q.C., and Mr. *Cohen*, for the Appellants:—

The Judge in the Court below, acting on the advice of the Trinity Masters, has miscarried in his judgment. The evidence shews that the *Sea Venture* had not her Regulation lights duly exhibited and brightly burning, and that it was in consequence of such neglect that the collision occurred. The *Sea Venture* was

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alone to blame; but the judgment in the Court below proceeded entirely upon the ground, that the *Fenham* might have avoided the collision; even if she could have done so, it would only have been by more than ordinary promptitude and skill, which was rendered impossible by the negligence of those on board the *Sea Venture*. There is no proof of such negligence on the part of the *Fenham* as could justify the finding of the Trinity Masters. In *Dowell* v. *The General Steam Navigation Company* (1) the circumstances were precisely similar. There the collision was occasioned by the want of the exhibition of proper lights, and the Court held, that that was such negligence as rendered the Vessel liable.

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *Clarkson*, for the Respondents:—

The judgment of the Court below was founded on the opinion of the Trinity Masters, the learned Judge expressly says so, and that he considered himself bound by their opinion. That opinion, distinctly stated by them, was, that it was not the admitted disobedience to the law by the *Sea Venture* in not putting up her lights in due time which occasioned the collision, but the act of the *Fenham* starboarding her helm at the particular time she did, that occasioned the collision. It was held in *Morrison* v. *The General Steam Navigation Company* (2), that where a Vessel, through sheer negligence, injures another Vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty Regulations by not exhibiting a light, afforded no justification under the 26th section of the 14 & 15 Vict. c. 79, as the absence of the light did not in any way contribute to the accident. *The Vivid* (3) was decided by this Tribunal upon the same principle. We submit, that the sentence of the Court of Admiralty ought to be affirmed, and the cause remitted, with all its incidents, and the Appellants condemned in costs.

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THE MASTER OF THE ROLLS:—

The collision in this case is shewn by the evidence to have occurred about five o'clock in the afternoon of the 13th of November, 1869, off *Whitby*, on the coast of *Yorkshire*, between the *Sea*

(1) 5 E. & B. 195. (2) 8 Ex. 733. (3) 10 Moore's C. P. Cases, 472.

1 Jur. N.S. 801 17 Jur. 507

Venture, a Brig of 220 tons register, and the *Fenham*, an iron screw Steamship, of 567 tons register.

The statement of the Appellants is, that when about four and a half miles from *Whitby*, heading N. ½ W., the *Fenham* was going at the rate of five or six knots an hour, that she had her three Admiralty Regulation lights duly exhibited and burning brightly, and a good look-out was being kept. They say, that the *Sea Venture* was first seen at a distance of about a quarter of a mile off the starboard bow, and they say that, as no lights were visible on the *Sea Venture*, the persons on board the *Fenham* concluded that the *Sea Venture* was moving in the same direction as themselves; but when the *Fenham* approached the Brig, she was seen to be standing in on the starboard tack, and thereupon the Master of the *Fenham* at once ordered the engines to be reversed full speed, and the helm to be put hard-a-starboard, as the only possible means of avoiding a collision. The *Sea Venture*, however, instead of keeping on her course, put her helm hard-a-port, and thereupon the *Fenham* ran stem on into the port side of the Brig about amidships. They also say that the *Sea Venture* had not her Regulation lights duly exhibited.

On the other hand, the Respondents say, that the *Sea Venture* was proceeding under close-reefed topsails and fore-topmast stay-sail close hauled on the starboard tack, at the rate of about two knots an hour, steering about S.W. by S. in for the land to smoother water, with the intention of bringing up in *Scarborough Wake*. They say that a good look-out was kept, and that her Admiralty port Regulation lamp was duly exhibited and burning brightly, and her starboard Regulation lamp was then about to be exhibited; that at this time the *Fenham* was observed at the distance of a mile and a half to be bearing about S.S.E. from her; that the *Sea Venture* then kept on her course close hauled to the wind on the starboard tack, in the expectation that the *Fenham*, which was under steam, would keep out of her way; that, instead of doing so, the *Fenham* approached the *Sea Venture;* the helm of the *Sea Venture* was put hard-a-port, but the *Fenham* then ran into the *Sea Venture* on her port side about the fore-rigging.

There is one fact of great importance clearly established in this case, which is, that the Brig shewed no lights at all, or, at least, if

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she did shew a light, it was not till the collision was imminent; and therefore, in effect, for any practical purpose, she shewed no lights. In that state of circumstances this is the usual rule,—that the omission to exhibit the proper lights in some cases is immaterial, if it is clearly shewn that the absence of such lights was not the cause of the collision, or did not, in any respect, conduce to it, and their Lordships assent to that view of the case; but, at the same time, it is of the greatest possible importance, having regard to the Admiralty Regulations, and to the necessity of enforcing obedience to them, to lay down this rule, that if it is proved that any Vessel has not shewn lights, the burden lies on her to shew that the non-compliance with the Regulations was not the cause of the collision.

Their Lordships not only think that the Brig has not shewn that, but on a fair review of the case their Lordships are unable to come to the conclusion to which the Trinity Masters in the Court below arrived. It is to be observed also, that the learned Judge of the Admiralty Court dissented from the opinion of the Trinity Masters, though, at the same time, he considered himself bound to act upon their opinion.

This is clearly proved, that the Steamer saw, looming in the dark, two Vessels at about the same time in the evening. Their Lordships are informed by the Nautical Assessors who assist them in this matter, that the mere fact of seeing a Vessel looming in the dark would not, if she exhibited no lights, point out which way the Vessel was going until she was sufficiently near to enable the set of her sails to be seen: that when the set of the sails is seen, the course of the Vessel can be ascertained; but that the Vessel herself may be seen before the set of her sails can be ascertained. Their Lordships consider this to be the rule, not only that Vessels must obey the Admiralty Regulations, but that they are bound to obey them in due time. Their Lordships consider that if the Brig in this case had shewn her proper lights, they would have been visible to the Steamer, and that if she had seen the red light when the Brig was first visible, the Steamer would have known what to do, and might have avoided the collision; but it appears that she saw nothing of the sort.

The Trinity Masters seem to have been of opinion, that if the

Fenham had starboarded at the time when the *Sea Venture* was at the distance which she says she was, the collision would not have happened, but she would have gone clear of her. Their Lordships do not see anything in the evidence to justify that conclusion, nor are they of opinion, that the Steamer was bound to assume that the Brig had disobeyed the Admiralty Regulations. It is to be observed that Seamen, no doubt, would tell more accurately the distance of the one Vessel from the other than persons unaccustomed to the sea; but it is to be remembered that this occurred on a dusky evening, about three-quarters of an hour after the sun had gone down, when night was closing in rapidly, and when there were no stars visible. In this state of circumstances their Lordships cannot rely upon the accuracy of the estimate of the persons on board the Brig, when they state the distance at which they were from the Steamer. The more so, as their interest obviously is to make the distance as great as possible.

The Elder Brethren of the Trinity Corporation have stated that in their opinion "upon her own evidence, other portions of which it is unnecessary to refer to, she, that is, the Steamer, must have seen the other Vessel at a greater distance than she admits." Their Lordships find themselves unable to concur with this view, which, also, is not that adopted by the Nautical Assessors; on the contrary, they think it clear, that directly those on board the Steamer did ascertain where the other Vessel was, and the course she was on, the helm was put hard-a-starboard, and the engines were reversed. Their Lordships think, that the grounds of the decision to which the Trinity Masters came are too slight to rely upon, and they are unable, assisted by their Nautical Assessors, to arrive at the same conclusion. Their Lordships think, that the real cause of the collision was the omission of the Brig *Sea Venture* to comply with the Admiralty Regulations, and that she was solely to blame for the calamity that occurred. The consequence is, that, in the opinion of their Lordships, the judgment must be reversed, and the owners of the Steamer must have their costs in the Court below as well as here; and their Lordships will humbly advise Her Majesty accordingly.

Proctor for the Appellants: *H. G. Stokes.*
Solicitor for the Respondents: *T. Cooper.*

J. C.* 1870 *June* 27, 28.

THE QUEEN . . . . . APPELLANT;

AND

JAMES CARLIN . . . . . RESPONDENT.

THE "SALVADOR."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF THE BAHAMAS.

Foreign Enlistment Act, 59 *Geo.* 3, *c.* 69, *s.* 7, *construction of—Insurrection in Cuba—Fitting-out Transport or Store-ship for use of Insurgents—Forfeiture.*

The *Foreign Enlistment Act*, 59 Geo. 3, c. 69, for prevention of enlisting into Foreign Service, or the fitting-out or equipping in Her Majesty's dominions Vessels for warlike purposes, provides, by sect. 7 (1) That such Ship or Vessel must be acting without leave or licence of the Sovereign of this Country; (2) That she must be equipped, furnished, fitted-out, or armed, or there must be a procuring, or an attempt, or endeavour to equip, furnish, fit-out, or arm the Ship; (3) That such equipment, furnishing, fitting-out, or arming, must be done with the intent or in order that the Ship or Vessel shall be employed in the service of some "Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, or of any Person or Persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People;" (4) That there must be an intent to employ the Ship or Vessel either as a Transport or Store-ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, or against the subjects or Citizens of such Prince, &c., or the persons exercising, or assuming to exercise, the powers of Government in any Colony, Province, or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province, or part of any Province or Country; (5) That such Foreign Prince, State, or Potentate, &c., is one with whom His Majesty should not then be at war.

A Vessel having been seized under warrant from the Governor of the *Bahama Islands*, and proceeded against in the Vice-Admiralty Court there, for breach of the 7th section of the *Foreign Enlistment Act*, was, upon the hearing of the cause, ordered to be restored, the Vice-Admiralty Court not being satisfied that the Vessel was engaged, within the meaning of that section, in aiding parties in insurrection against a Foreign Government, as

* *Present*—Lord Cairns, Sir James William Colvile, Sir Robert Phillimore (Judge of the High Court of Admiralty), and Sir Joseph Napier, Bart.

such parties did not assume to exercise the powers of Government over any portion of the territory of such Government. Such decision overruled on appeal by the Judicial Committee, on the ground that it was established, that there was an insurrection in the Island of *Cuba*, the Foreign Government in question; that there were Insurgents who had formed themselves into a body of people, who formed part of the Province or people of *Cuba*, acting together, and undertaking and conducting hostilities; that the Vessel was employed as a Transport or Store-ship in connection with, and in the service of, this body of Insurgents; and that the Judge of the Court below had miscarried in confining his attention to the second alternative of the third branch of the section, which requires that the person or persons aided must be exercising, or assuming to exercise, the powers of Government.

THIS was an appeal from the decision of the Deputy Judge of the Vice-Admiralty Court of the *Bahamas*, restoring the Vessel *Salvador*, which had been seized by the Receiver-General and Treasurer for a breach of the *Foreign Enlistment Act*, 59 Geo. 3, c. 69, s. 7, under a warrant issued by the Governor of Her Majesty's *Bahama Islands*.

The cause commenced in the Vice-Admiralty Court of the *Bahamas*. An appearance under Protest was entered for *Carlin*, the Respondent, the Master and Owner of the British Steamship *Salvador*, and a claim filed in his name for restoration of the Vessel. The Act on Protest raised the question, amongst others, whether a cause of forfeiture could be sustained under the 6th section of the above Act, and the Judge ultimately decided, that the cause of the forfeiture must be confined to alleged breaches of the 7th section, and the Protest was overruled, so far as related to those causes of forfeiture, and the Claimant was ordered to appear absolutely.

On the 22nd of June, 1859, an information on the part of the Crown was filed, claiming forfeiture of the Vessel, for a breach of the 7th section of the above-mentioned Act.

The Respondent filed a plea denying the allegations, and alleging that neither he nor any other person or persons did, within Her Majesty's dominions, equip, furnish, or fit-out, nor did he or they aid or assist, nor were he or they concerned, in the equipping, furnishing, or fitting-out of the Steamship *Salvador*, with intent, or in order, that she should be employed as a Transport or Store-ship in the service and for the purposes in the information alleged, and prayed restitution of the Ship, with costs and damages.

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No evidence was adduced on the part of the Claimant, but from the witnesses produced on the part of the Crown, and the proceedings had in the Vice-Admiralty Court, the circumstances under which the *Salvador* was seized appeared to be as follows:—

The *Salvador* sailed from the port of *Havana*, in the Island of *Cuba*, on the 22nd of February, 1869, under a provisional register, the Respondent being sole Owner and Master, for *Jacksonville*.

On the 24th of March, 1869, his Excellency the Governor of the *Bahama Islands*, in consequence of the insurrection in *Cuba*, issued a Proclamation to the following effect:—

"Whereas an armed insurrection against the Government of *Spain* is reported to have taken place, and to be now existing in the Island of *Cuba*, one of the dependencies of *Spain*.

"And whereas from the proximity of these Islands to the said Island of *Cuba*, persons engaged or interested in such insurrection may be induced to resort to these Islands with a view to using the different ports thereof as points of departure for the said Island of *Cuba*.

"And whereas Her most Gracious Majesty Queen *Victoria* is now at peace with the Government of *Spain*, and it is requisite that Her Majesty's subjects and other persons residing and being within this Colony should abstain from any acts which can be construed into a violation of the amicable relations so existing between *Great Britain* and *Spain*, and from violating or in any way contravening the provisions of a certain Statute of the Imperial Parliament of *Great Britain* and *Ireland*, made and passed in the 59th year of the reign of the late King *George* III., to prevent the enlisting or engagement of British subjects to serve in Foreign service, and the fitting-out and equipping in the dominions of *Great Britain* Vessels for warlike purposes.

"Now, therefore, that persons may not plead ignorance of the provisions of the said Statute, or unwarily render themselves liable to the penalties thereby imposed, I do issue this my Proclamation notifying as well to all Her Majesty's loving subjects within these Islands, as to all other persons residing or being within the same, that in and by the said Statute so made and passed as aforesaid, 59 Geo. 3, c. 69, entitled 'An Act to prevent the enlisting or engagement of His Majesty's subjects to serve in Foreign service,

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and the fitting-out and equipping in His Majesty's dominions Vessels for warlike purposes without His Majesty's license, it is, amongst other things, enacted as follows:—'" The Proclamation then contained the principal provisions of the British *Foreign Enlistment Act*, 59 Geo. 3, c. 69, including the 7th section, in these words:—"That if any person, within any part of the *United Kingdom*, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit-out or arm, or procure to be equipped, furnished, fitted-out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting-out, or arming of any Ship or Vessel with intent or in order that such Ship or Vessel shall be employed in the service of any Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, or of any Person or Persons exercising or assuming to exercise any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People, as a Transport or Store-ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, or against the subjects or citizens of any Prince, State, or Potentate, or against the persons exercising or assuming to exercise the powers of Government in any Colony, Province, or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province, or part of any Province or Country with whom His Majesty shall not then be at war, or shall, within the *United Kingdom*, or any of His Majesty's dominions, or in any Settlement, Colony, Territory, Island, or place belonging or subject to His Majesty, issue or deliver any commission for any Ship or Vessel to the intent that such Ship or Vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof upon any information or indictment, be punished by fine or imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted, and every such Ship or Vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of any such Ship or Vessel shall be forfeited; and it shall be lawful for any Officer of His Majesty's

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Customs or Excise, or of any Officer of His Majesty's Navy who is by law empowered to make seizures for any forfeiture incurred under any of the laws of customs or excise, or the laws of trade or navigation, to seize such Ships and Vessels aforesaid, and in such places and in such manner in which the Officers of His Majesty's Customs or Excise, and the Officers of His Majesty's Navy are empowered respectively to make seizures under the laws of customs or excise, or under the laws of trade and navigation; and that every such Ship and Vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such Ship or Vessel, may be prosecuted and condemned in the like manner and in such Courts as Ships or Vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation."

The *Salvador*, instead of going to *Jacksonville*, put into *Key-West* for repairs, and stayed there for about two months. She then sailed for *Nassau* without any cargo, but having forty-two Passengers on board, all described as Cubans. She arrived in the harbour of *Nassau* in the afternoon of the 7th of May, 1869, and was consigned by the Respondent to the firm of Messrs. *Tunnell & Loinaz*. The next day an application was made to the Receiver-General for a permanent register, which appeared to have been granted on the 10th of that month, the Respondent being described as sole Owner and Master of the Vessel.

On the 8th of May, 1869, the Receiver-General went on board, and with the aid of some men from an English Man-of-war searched her. She had then nothing in her hold but coal, and which they were then removing to the bunkers, but he found some packages which had been sent on board without his permission by a Dr. *Tinher*, who was also described as a Cuban. The Receiver-General caused these packages to be examined, of which two were found to contain coarse brown holland shirts and trousers, two boots and gaiters, and one contained hatbands and cockades; there were also seven rifles, and empty flannel cartridge bags for a six-pounder field-piece. In another box two Flags, one an English ensign, and the other blue and white stripes, with a red triangle at the head, and a star in the centre. The hatbands contained the same device

as the flag. The packages were detained at first, but afterwards the Receiver-General allowed entries to be put in for them, and released them.

Tunnell appeared to have transacted, in the absence of *Loinaz*, all the business of Consignee. It also appeared that *Tunnell* made application on the 8th of May, 1869, to ship various articles, such as rifles, swords, powder, and other things, which the Receiver-General at first refused, without the sanction of the Governor of the Islands. On the 10th of May, however, permission was given to do so, and on that day many such articles, specified in the Ship's report outwards, were shipped. *Tunnell*, in his evidence, stated that he made these shipments entirely by order of a Cuban gentleman named *Martin Castillo*, who paid all the expenses incurred, and that he supplied the *Salvador* with a considerable quantity of provisions, as well as 1,100 gallons of water, and made other disbursements on her account, which were charged to the Ship. *Tunnell* eventually, on the 10th of May, cleared the Vessel for *St. Thomas*, and she broke ground and left the harbour of *Nassau* at about 5 o'clock P.M.

It further appeared, that after she had passed *Fort Montague* a short distance she again cast anchor, and that between her doing so and six o'clock on the morning of the 11th she received on board about eighty Passengers from the shore, who were described as Cubans, many of them having been living at a place called *Waterloo*, and some at a place called the "*Barn*," both places being within a short distance of *Fort Montague*, off which the *Salvador* was lying, these persons having been for some time under the surveillance of the local Police, and the boat hire for putting them on board having been paid by *Tunnell*, on orders drawn by Captain *Carlin*. That on the Receiver-General proceeding in the Cutter belonging to Her Majesty's ship *Royalist* to detain the *Salvador*, and when within about one hundred yards of her, he noticed the anchor was being hove up, and when the Cutter had pulled a few strokes further, he noticed that the water boat, which had been alongside, was pushed off, and that the anchor was being hove up very rapidly, the *Salvador* at the same time moving ahead; and that he fired across her bows to stop her, but she paid no attention to the signal, and proceeded on her voyage, her decks being

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apparently crowded with men. The *Salvador* then went direct to *Cuba*, arriving there early on Friday morning, remaining there two days without making any attempt to go into port; some of the cases, containing clothes, shoes, and boots, were opened on board, and the rifles taken ashore, and landed on the *Cays*. All the Passengers, with the rest of the cargo, were also landed, and some ten hours afterwards they had erected a battery, and had thrown out skirmishers. The Respondent admitted this, and also that while they were at the *Cays*, seeing a Spanish Man-of-war passing, they had abandoned the Vessel, and were about to set her on fire, but as the Man-of-war passed without seeing them, he again took charge of the *Salvador* and came out. The *Salvador* sailed from the *Cays* on Sunday, and arrived at *Nassau* on the following Tuesday evening, and was then seized by the Receiver-General as before stated.

The Deputy Judge of the Vice-Admiralty Court (The Hon. *Charles Frederick Rothery*) decreed the restitution of the Vessel. In his judgment, after stating the facts and circumstances above detailed, he proceeded in these terms:—

"From this state of facts the Advocate-General argues, that the *Salvador* is liable to forfeiture under the 7th section of the *Foreign Enlistment Act*. He contends, that Captain *Carlin* was Owner and Master of the *Salvador*, and had, therefore, full control over her; that the articles supplied to her were necessary to her as a Transport. That the intent to use her as a Transport was proved by her subsequent voyage, and that the hostile proceedings of the persons immediately on their landing, their avoiding any port of entry, and their evident alarm of a Spanish man-of-war that passed by, are proofs of their being at war with the Spanish Government, and that these, together with the fact of no counter evidence, and also that there was a general insurrection in the Island of *Cuba*, being produced by the Claimant, are sufficient proof that they were in the service of persons assuming to exercise the powers of Government in or over part of the Island of *Cuba*, and that, therefore, the Vessel that took them over for this purpose may be taken to be in the same service. The Counsel for the Claimant, on the other hand, submitted that the *Salvador* had committed no breach of the 7th section of the Act, and should be restored with costs and damages. He first stated, that it should have been proved that

no leave or licence was granted by the Crown; secondly, that Captain *Carlin* did nothing in *Nassau* towards the fitting-out of the *Salvador*, and that the fitting-out contemplated by the Act is an addition or alteration to the material of the Ship itself, and that provisions, water, and repairing certain tools belonging to the engine do not come under that definition; and lastly, that the Act contemplates a state of war between two parties in which *England* is declared to be neutral, and that the present disturbances in *Cuba* cannot be considered, according to the authorities, as indicating a state of war between *Spain* and the inhabitants that are at present in a state of insurrection. The first point, that with regard to the leave and licence of the Crown, I will dispose of before I enter into the rest of the case. I think, that if it was intended to be used as a defence, that the Claimant should have distinctly affirmed in the responsive plea that he had the leave and licence of the Crown, and that then it would have rested on him to prove that such leave or licence had been granted. I shall now come to the main points of the case, and before doing so, I may as well state, that I have carefully read all the authorities, English and American, bearing on the 7th section, and that I have not derived much assistance from them in deciding this case. All the cases that have yet occurred are cases of Ships of war, and the meaning of the terms 'equip, fit-out, or furnish,' may be very different when applied to Ships of war and when applied to a Transport or Store-ship. Moreover, the arguments in some of those cases went upon, whether the Vessel was fully equipped and ready to commence hostilities on leaving the port; also the fact of there being a state of war between the *United States* and the *Confederate States* was not disputed. I shall have, therefore, to rely principally on my own construction of the words of the Act (59 Geo. 3, c. 69) for judgment in this case. The preamble is shortly as follows:—Whereas the enlistment of His Majesty's subjects to serve in war in Foreign service, and the fitting-out of Vessels by His Majesty's subjects for warlike operations against the territories of any Foreign state, &c., may be prejudicial to and tend to endanger the peace and welfare of this Kingdom. Now, this expedition of men, with arms and ammunition, may certainly be considered a warlike operation, though it may not amount to

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war. And most decidedly it is a proceeding that is likely to endanger the peace and welfare of *England*. I, therefore, do not consider it excluded by the preamble. The 7th section, so far as we require it at present, provides for the case where any person in any part of His Majesty's dominions beyond the seas shall equip, furnish, or fit-out any Vessel with intent or in order that such Vessel shall be employed in the service of any persons assuming to exercise the powers of Government in and over any Foreign Colony, as a Transport or Store-ship, against any State with which His Majesty shall not then be at war. The first point I shall have to consider is the meaning of the words 'equip, fit-out, and furnish,' as applied to a Transport. The word 'furnish,' I thought at first, was particularly restricted to supplying what is called the furniture of a Ship; but I find that in one of the *Pirate Acts*, the 8 Geo. 1, c. 24, it is used as supplying ammunition, stores, and provisions; it may, therefore, be entitled to a more extended meaning than I had at first given it, but the word 'fit-out' has, in my opinion, so extended a meaning that it is unnecessary that I should use any other. The word 'fit-out,' in its ordinary meaning, varies according to the purpose for which it is used. I consider, that it includes anything necessary for carrying out the object you have in view, and, as applied to a Vessel, I consider it to mean supplying it with anything which it may require to carry out the voyage it may be engaged on. Now, what more necessary things can there be for a Vessel, intended to be used as a Transport-ship, than water and provisions? I, therefore, think that the supplying this Vessel with provisions for the purpose of carrying her Passengers across to *Cuba*, was a fitting-out according to the meaning of that word in the Act, and that, from the evidence before the Court, that Captain *Carlin* aided and assisted in this fitting-out, with the intent that this Vessel should be used as a Transport for the purpose of carrying over the people to *Cuba*. I think it unnecessary to say anything about the word 'Transport,' as I have no doubt that a Vessel carrying over a large body of fighting men, with weapons ready to their hands, is a Transport. Then, was this done against the Government of *Spain?* From the evidence, viz., their going among the *Cays* at the eastern end of *Cuba*, where there was no port of entry, their evident dread of

a Spanish man-of-war, and lastly, the fact of the Passengers immediately on landing preparing for defence or attack, I think that this expedition was clearly intended in some way against the Government of *Spain*. The last point I have to consider is, in whose service this was done. Was it done in the service of any persons assuming to exercise the powers of Government over any portion of the Island of *Cuba?* We will first see from the evidence before the Court what the fighting in *Cuba* is, and then whether the party opposed to the Government of *Spain* can be supposed to be exercising the powers of Government over any part of the Island of *Cuba*, and lastly, if I think there is such a party, whether the *Salvador* was in their service. The best evidence we have on the point is the evidence of the witness *Wells*. He was living in *Havana* for some time, and he said that there were insurrections all over the Island of *Cuba*, more or less. All the other evidence in the case, though some was from reports only, went to the same effect, that there was a very serious insurrection or revolt in the Island of *Cuba* against the Spanish Government, because Spanish soldiers were sent from the Towns for the purpose of putting it down. The Governor-General *Dulce*, in his Proclamation, which has been forwarded to his Excellency, Sir *James Walker*, by the Spanish Consul, or rather, I should say, in the translation of it, uses the words 'insurrection in the interior,' but also says, that it has been put down by force of arms. This is all the evidence before the Court of the disturbances in *Cuba*. We have no evidence of the object of the insurrection, who are the Leaders, what portion of *Cuba* they have possession of, in what manner this insurrection is controlled or supported, or in what manner they govern themselves. How, therefore, can I say that they are assuming the powers of Government in or over any part of the Island of *Cuba?* I consider this case of the *Salvador* as a military expedition set on foot at *Nassau* for the purpose of attacking the dominions of a friendly Power, but not as coming under the 7th section of the 59 Geo. 3, c. 69. The American Act has a remedy for this, but which is not in our Act; and, therefore, as the proof fails on this point, I must decree the restitution of the Vessel. I have now come to the question of costs. This Vessel clears from here on the Monday for *St. Thomas*,

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and then anchors to the eastward of *Fort Montague*, and takes in, in a clandestine manner, a number of persons, and when an English man-of-war's boat attempts to stop her she steams off, and where does she go to? Direct to *Cuba*. On her coming back, I think, the Government were quite right in detaining her, that her proceedings might be inquired into. Under these circumstances, I shall certainly not give any costs or damages."

The appeal was from this sentence.

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A motion was made for a decree of appraisement and sale of the Vessel, pending the appeal, which was ordered, and the Vessel was sold.

No appearance having been entered by the Respondent, or case lodged by him, the appeal was heard *ex parte*.

The *Attorney-General* (Sir *R. P. Collier*, Q.C.), the *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Mr. *Archibald*, for the Appellant:—

The Proclamation of the 24th of March, 1869, stated that an insurrection against the Government of *Spain* was reported to have taken place, and to be then existing in the Island of *Cuba*, and upon the fact of that report being well founded, and a state of insurrection actually existing in *Cuba*, the Proclamation against Her Majesty's subjects in the *Bahamas* enlisting or engaging in a Foreign service in aid of such insurrection was legally and properly issued. All the Witnesses shew, and the learned Judge of the Vice-Admiralty Court below himself admits, that there was a very serious insurrection or revolt in the Island of *Cuba* against the Spanish Government. *Vattel* on the Law of Nations, B. III., of Civil War, ch. xviii., sect. 289, defines and describes in what consists popular commotion and insurrection, and the requisites there stated are proved in this case to have existed. But the learned Judge, though apparently satisfied that there was a state of insurrection in *Cuba*, hesitates to apply the penal section of the *Foreign Enlistment Act*, because he cannot find that such insurrection is in favour of any persons assuming the powers of Government, or pretended Government, in the Island of *Cuba;* though the nature and object of the

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., and THE LORD JUSTICE GIFFARD.

expedition for which the *Salvador* was equipped and fitted-out is from the evidence proved to have been in aid of this insurrection, and she, being a British Vessel, was engaged in and for a military expedition, for the purpose of attacking the dominions of a friendly Power, yet the Judge of the Vice-Admiralty Court refused to declare the Vessel liable to forfeiture within the meaning of the 7th section of the Act (1). We submit, such a decision is neither consonant to the law nor the facts of the case. As the Colonial Government have incurred considerable expenses in keeping the Vessel while under arrest, provision ought, in the event of a reversal of the sentence, to be made to reimburse the same out of the proceeds of the sale.

Their Lordships' judgment was delivered by

LORD CAIRNS:—

This is an appeal from the decision of the Vice-Admiralty Court of the *Bahamas*, upon an information filed on behalf of the Crown before that Court under the *Foreign Enlistment Act*, with regard to the Ship *Salvador*, and seeking her confiscation.

The section in the *Foreign Enlistment Act* which has to be considered is the seventh. It has frequently been remarked, that the interpretation of that section is attended with some difficulty, mainly owing to the great quantity of words which are used in the clause; but endeavouring for the moment to set aside the verbiage of the section, it is obvious that, in order to constitute an offence under it, five propositions must be established. In the first place, the Ship, which in other respects is found to be acting within the meaning of the section, must be acting without the leave and license of the Sovereign of this Country. That is the first element of the charge under the section. The second is this, the Ship must be equipped, furnished, fitted-out or armed, or there must be a procuring, or an attempt or endeavour to equip, furnish, fit-out, or arm the Ship. The third is, that the equipping, furnishing, fitting-out, or arming of the Ship must be done with the intent or in order that the Ship or Vessel shall be employed in the service of

(1) As to the construction of this section, respecting "equipping, furnishing, or fitting-out," see *Attorney-General* v. *Sillem*, 2 H. & C. 431, 10 Jur. N.S. 262

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some "Foreign Prince, State, or Potentate, or some Foreign Colony, Province, or part of any Province or People, or of any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People."

Then the fourth element in the section is this, there must be an intent to employ the Ship in one of two capacities, either "as a Transport or Storeship against any Prince, State, or Potentate;" or "with intent to cruise or commit hostilities against any Prince, State, or Potentate." I pause for the purpose of observing that the words are not very happily chosen which represent her as being employed "as a Transport or Store-ship against any Prince, State, or Potentate;" but it is clear, open as the words may be to criticism, that the intent is, that the Ship should be employed in one of the two capacities I have mentioned, and not only so, but employed "against," that is in the way of aggression against, some Foreign Prince, Potentate, or State. This should be done, as I have already said, against some Prince, State, or Potentate, "or against the subjects or citizens of any Prince, State, or Potentate, or against the persons exercising or assuming to exercise the powers of Government in any Colony, Province, or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province, or part of any Province or Country." And the fifth element is, that this Foreign State or Potentate, and so on, should be one with whom the Sovereign of this Country should not then be at war.

Those are the five elements which go to make up the whole charge under the 7th section.

Now, with regard to the first which I have mentioned, the absence of leave and licence on the part of Her Majesty, no question arises.

With regard to the second, namely, that there must be an equipping, furnishing, fitting-up, or arming, or a procuring, or an attempt to do so, no question can arise in this case when we read the evidence of Mr. *Dumaresq*, the Receiver-General and Treasurer of the Island, who states the condition in which he found the Ship, and the preparations made on board of her, which seem to their Lordships to amount to a fitting-out or arming, or an attempt

to do so, within the meaning of this section. The learned Judge of the Vice-Admiralty Court seems to have entertained no doubt himself upon this part of the case.

I pass over the third element which I mentioned, for the moment, in order to say that upon the fourth and fifth heads to which I have referred there can also be no doubt entertained, as it seems to their Lordships; and here, again, no doubt was entertained by the learned Judge of the Court below. It is quite clear, that the Ship was intended to be used as a Transport or Store-ship against a Prince, State, or Potentate with whom Her Majesty was not at war. She was to be used obviously as a Transport or Store-ship for the purpose of conveying to *Cuba* men and materials; and in that way to do the duty of a Transport-ship, and so to inflict injury upon the Spanish Government, who at that time were, and are now, the lawful authority having the dominion over *Cuba*. Here, again, no doubt was entertained by the learned Judge in the Court below, and no doubt could be entertained by any one who looks at the evidence of Mr. *Dumaresq*, to whom I have already adverted, and also the evidence of Mr. *Butler*, the Collector of Revenue, both of whom state what the report was which was made to themselves by *Carlin*, the Master of this Vessel, as to her conduct when she went to the coast of *Cuba*—how she landed all the men she had on board, plainly for the purpose of taking part in the insurrection which was going on in *Cuba*—how they abandoned the Ship when they saw a Spanish Ship of war in sight—how they were prepared to set fire to their Ship if the Spanish Ship approached them—and how afterwards, when they found that they were unnoticed, they took possession of the *Salvador* again, and brought her back to *Nassau*.

That leaves uncovered only the third element of charge in this section, and it is upon that alone that the learned Judge of the Vice-Admiralty Court entertained any doubt.

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The third element is, that the Ship must be employed in this way in the service of some "Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, or of any person or persons exercising or assuming to exercise any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People." It is to be

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observed that this part of the section is in the alternative. The Ship may be employed in the service of a Foreign Prince, State, or Potentate, or Foreign State, Colony, Province, or part of any Province or People; that is to say, if you find any consolidated body in the Foreign State, whether it be the Potentate, who has the absolute dominion, or the Government, or a part of the Province or of the People, or the whole of the Province or the People acting for themselves, that is sufficient. But by way of alternative, it is suggested that there may be a case where, although you cannot say that the Province, or the People, or a part of the Province or People are employing the Ship, there yet may be some person or persons, who may be exercising, or assuming to exercise, powers of Government in the Foreign Colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the Ship prepared or acting in the service of "any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or people;" but that alternative need not be resorted to, if you find the Ship is fitted-out and armed for the purpose of being "employed in the service of any Foreign State or People, or part of any Province or People."

Upon that the observation of the learned Judge was this:— "We have no evidence of the object of the insurrection, who are the Leaders, what portion of *Cuba* they have possession of, in what manner this insurrection is controlled or supported, or in what manner they govern themselves. How, therefore, can I say that they are assuming the powers of Government in or over any part of the Island of *Cuba?*"

Now, it appears to their Lordships, that the error into which the learned Judge below fell, was in confining his attention to what I have termed the second alternative of this part of the section, and in disregarding the first part of the alternative. It may be (it is not necessary to decide whether it is so or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in *Cuba*, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that

subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section; but their Lordships are clearly of opinion, that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt,—there was an insurrection in the Island of *Cuba;* there were Insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these Insurgents, beyond all doubt, formed part of the Province or people of *Cuba;* and beyond all doubt the Ship in question was to be employed, and was employed, in connection with and in the service of this body of Insurgents.

Those propositions being established, as their Lordships think they clearly are established, both by the evidence of *Dumaresq* and *Butler,* to which I have already referred, and further, by the evidence of the three witnesses, *Loinaz, Wells,* and *Mama,* their Lordships think that the requisitions of the seventh section in this respect are entirely fulfilled, and that the case is made out under this head, as it is upon all other heads of the section.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decision of the Vice-Admiralty Court should be reversed, and that judgment should be pronounced for the Crown, according to the prayer of the information.

It has been intimated to their Lordships, that on the 7th of February last, there was a decree by their Lordships for the appraisement and sale of the Vessel. She has been sold, and the net proceeds, £163. 4*s.* 8*d.*, paid into Her Majesty's Commissariat chest in the *Bahamas.* The Colonial Government, it appears, have incurred expenses to the amount of £145. 5*s.* 10*d.* in keeping the Vessel while she was under arrest, and they claim to be reimbursed those expenses out of the proceeds of the sale. That, of course, will be proper, and if it is necessary to make that part of this Order, it will be done.

Her Majesty's Proctor, *F. H. Dyke,* for the Appellant.

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THE QUEBEC MARINE INSURANCE COMPANY. . . . . } APPELLANTS;

AND

THE COMMERCIAL BANK OF CANADA . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

River and Sea Insurance—Voyage Policy, terms of—Special exemptions from loss—Implied warranty of seaworthiness—Boiler defective, but remedied before loss of Vessel.

A Policy on a Steam Vessel was effected in *Lower Canada* at and from *Montreal* to *Halifax*, in *Nova Scotia*. The Policy especially excepted the Underwriters, *inter alia*, from "rottenness, inherent defects, and other unseaworthiness; theft, barratry, or robbery; bursting or explosion of Boilers, or collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external cause, or fire ensue therefrom; and charges, damages, or loss in consequence of a seizure or detention on account of any illicit or prohibited trade in articles contraband of war." At the time of starting there was a defect in the Boiler of the Vessel, which was not apparent in rivers, but when she got into salt water she became disabled by reason of such defect, and was compelled to put into port to repair, when, after being repaired and detained for some days, she proceeded to sea, but encountering bad weather was lost:—

Held, first, that in a Voyage Policy there is, by implication of law, a warranty of seaworthiness, which had not been complied with, as the Vessel sailed with a defect of such a nature that, so long as it remained unremedied, it made her unseaworthy for the voyage, or stage of the voyage, she entered upon, and that although the defect was afterwards repaired, though before loss, it avoided the Policy:

Secondly, that the enumeration of excepted losses contained in the Policy, from "loss from unseaworthiness," did not exclude the implied warranty of seaworthiness, as it did not expressly specify an intention to exclude it.

There may be different stages of seaworthiness in cases where the different stages of navigation involve the necessity of a different equipment or state of seaworthiness; but the Vessel must be properly equipped, and in all respects seaworthy, for each of the stages respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.

The case of *Weir* v. *Aberdeen* (1) observed on and discussed.

IN this case the Appellants, the Underwriters, were a Marine Insurance Company, and the action was brought against them by

* *Present* at the first hearing on the 21st and 22nd of January, 1870:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE, and SIR JOSEPH NAPIER, BART.

Present at the second hearing on the 20th of April, 1870:—LORD PENZANCE, SIR WILLIAM ERLE, and THE LORD JUSTICE GIFFARD.

(1) 2 B. & Ald. 320.

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the Respondents on a Policy of Insurance effected on a Steam Vessel called the *West*, for a voyage from *Montreal* to *Halifax*, in *Nova Scotia*. The Policy was in the form used in *Lower Canada* in cases of inland navigation.

The declaration alleged, that by the Policy, made on the 10th of November, 1864, the Defendants insured $6,000 on account of the Plaintiffs, upon the propeller called the *West*, at and from *Montreal* to *Halifax* in *Nova Scotia*, the Vessel being warranted to sail on or before the 21st of November; valued at $24,000, and that "touching the adventures and perils which the Assurers were to bear and take upon themselves by the Policy, they were of the lakes, rivers, canals, fires, jetsoms, &c., which should come to the damage of the Vessel, excepting all perils, losses, or misfortunes arising from, or caused by, the following legally excluded causes:—for damages that might be done by the Vessel to any other Vessel or property; for incompetency of the Master or insufficiency of the Crew; or from the want of ordinary care and skill in loading and stowing the cargo; from rottenness, inherent defects, and other unseaworthiness; theft, barratry, or robbery; bursting or explosion of Boilers, or collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external cause, or fire ensue therefrom; and charges, damages, or loss in consequence of a seizure or detention on account of any illicit or prohibited trade in articles contraband of war;" together with other causes enumerated in the declaration; that the *West* sailed within the period mentioned, and arrived on the 25th of November abreast of *Barnaby Island*, in the *Lower St. Lawrence*, when the Engineer reported that her Boilers had become unserviceable, and she was brought to anchor under shelter of the Island; that a telegram was sent to *Montreal* for assistance, and on the 29th of November, in order to bring the Vessel to a place of safety for the purpose of repairing her, the Crew brought her into a certain Harbour; that on the 30th of November assistance arrived from *Montreal*, one of her Boilers was duly repaired, but owing to the lowness of the tides she was not able to proceed until the 11th of December: that on that day, when abreast of *Matane*, her rudder was broken by a heavy sea; that it was then blowing a hurricane; that her sails were carried away, and next morning she stranded

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about seven miles below *Matane*, and became a total wreck: that the Plaintiffs gave due notice, and furnished all necessary proofs: that at the time of the making of the Policy, and up to the loss, the Plaintiffs had an insurable interest: and that there remained due to the Plaintiffs under the Policy the sum insured less salvage, and the Plaintiffs prayed judgment for that sum.

The Defendants pleaded a *défense au fonds en droit*, or demurrer, assigning for reasons, that the declaration did not aver that the Plaintiffs' interest amounted to the value of the moneys insured; that there was no averment that the loss did not happen from one of the risks excepted in the Policy, and that it did not aver that the Vessel was at the outset of the risk seaworthy; and also a *défense au fonds en fait*, or general traverse, and a perpetual exemption *péremptoire en droit*, or special plea in bar, by which it was alleged, that at the time of making the Policy, and at the time of the sailing of the *West* from *Montreal*, on her intended voyage, the *West* was not seaworthy for the voyage, by reason that the Engineer was ignorant of the management of Boilers in salt water, and by reason of deficiencies in the outfit of the Vessel, and because the Vessel was unfit, from rottenness of her timbers, and from the defects of her Boiler and rudder at the time of her sailing, to encounter the ordinary perils of the voyage; and the plea went on to allege, that in consequence of the defective state of the Boiler it gave way and burst about six hours after the Vessel had got into salt water, whereby the fires of the furnace were partially extinguished, and she was, of necessity, almost put on shore near the *Bie* in the *Saint Lawrence*, for the purpose of having the Boiler repaired; that after undergoing certain insufficient repairs, and having set sail again on the 11th of December, her rudder was shortly afterwards, by reason of its defective state, broken by the waves, and the Vessel, becoming unmanageable, was driven ashore. And the plea concluded by averring, that the loss was occasioned solely by her unseaworthiness at the outset of her voyage, and of her so continuing up to her loss, and that the Vessel was at no period from the commencement of the risk, more especially seeing the late period of the season at which she set sail, and attempted to prosecute her voyage, in a fit or seaworthy condition to accomplish the voyage.

The demurrer was first argued, and the Court dismissed it.

Evidence was then taken, and the following facts were proved:— The *West* was insured under a Policy agreeing with that stated in the declaration. The other allegations of fact in the declaration were also proved. It was also shewn, that the Plaintiffs had an insurable interest to the amount insured. In support of the special plea the Defendants proved, that the *West* had, at the time of making the Policy, and of her leaving *Montreal*, a crack three or four inches long in the surface of the Boiler; that this, so long as it remained unrepaired, rendered her unfit for her voyage; at any rate, for the salt water part of it; that this crack was known to the Engineer; that about six hours after she got into salt water the Vessel became, in consequence of this defect, unmanageable; that it was necessary to put into a neighbouring port to have the defect remedied; that the repairs took, when the men sent for from *Montreal* to do them arrived, about a day and a half; that the Vessel was unable, in consequence of the lowness of the tides, to resume her voyage until the 11th of December; that but for the necessity of making these repairs she would have proceeded from *Quebec*, where she had previously, as she was entitled, stopped to take in a cargo direct for *Halifax*, without stoppage on the way. The Defendants failed to substantiate the other defences alleged in their pleas. The Plaintiffs gave evidence to the effect, that the repairs to the Boiler were properly made and sufficient, and that the loss was caused by an hurricane in the mouth of the *St. Lawrence*. Mr. Justice *Stuart*, one of the Judges of the Superior Court, gave judgment, condemning the Defendants in the sum claimed.

From that judgment the Defendants appealed to the Court of Queen's Bench for the Province of *Quebec*. On the hearing of the appeal the Appellants abandoned all grounds of defence, except that the Vessel was unseaworthy at the commencement of the voyage, owing first to the incompetency of the crew for a sea voyage, because the Chief Engineer had never before been to Sea, and was ignorant of the management of Boilers in salt water; and, secondly, of the existence of defects in the Boiler of the Vessel, rendering repairs to it necessary before she started on her voyage.

The appeal came on to be heard on the 16th of March, 1868.

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The Court took time to consider, and afterwards, on the 20th of June, discharged the *délibéré*, and ordered the appeal to be heard *de novo*. On the 17th of September, 1868, the appeal was re-argued before the same Court, which again took time to consider, and finally, by a majority of three of the Judges, consisting of the Chief Justice *Duval*, and the Justices *Badgley* and *Monk*, gave judgment affirming the judgment of the Supreme Court, and dismissing the appeal with costs. Mr. Justice *Caron* dissenting (1).

From this judgment of affirmance the present appeal was brought.

The appeal was twice argued, first on the 21st and 22nd of January, 1870, by

Mr. *Mellish*, Q.C., and Mr. *H. M. Bompas*, for the Appellants; and

Mr. *Manisty*, Q.C., and Mr. *Fullerton*, for the Respondents;

And secondly, by one Counsel on each side, on the 20th of April, 1870, by

Sir *John Karslake*, Q.C. (Mr. *H. M. Bompas* with him), for the Appellants; and

Mr. *Manisty*, Q.C. (Mr. *Fullerton* with him), for the Respondents.

For the Appellants, it was contended, that the *West*, by reason of the crack in her Boiler, was at the time she left *Montreal*, as well as when she left *Quebec*, or when she entered sea water, unseaworthy, within the intent and legal effect of the Policy. That the fact of the Vessel having been repaired after the commencement of her voyage, though before the loss had occurred in consequence of her original defect, was immaterial, as regarded the conditions of the Policy, though the detention might have affected the risk of the voyage, and, in fact, did occasion the loss of the Vessel. They referred to *Weir* v. *Aberdeen* (2); *Roberts* v. *Barker* (3); *Cook* v. *Jennings* (4); *Line* v. *Stephenson* (5); *Aspdin* v. *Austin* (6); *Phillips* on Insur. § 695 [5th Ed.]

On the part of the Respondents it was insisted, that there was

(1) See case reported, 13 Low. Can. Jurist, 267.
(2) 2 B. & Ald. 320.
(3) 1 Cr. & M. 808.
(4) 7 Term R. 381.
(5) 5 Bing. N. C. 183.
(6) 5 Q. B. 684.

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no evidence of the unseaworthiness of the Vessel when she sailed from *Montreal*, the crack in her Boiler, even if admitted to have then existed, not being such a defect as rendered her "unseaworthy" within the meaning of the Policy; that the Policy was a river and not a sea Policy; and that the loss of the Vessel was caused wholly by the perils of the Sea, and not from any original and inherent defect rendering her unseaworthy at the commencement of her voyage. They cited and relied on *Wedderburn* v. *Bell* (1); *Weir* v. *Aberdeen* (2); *Forshaw* v. *Chabert* (3); *Dixon* v. *Sadler* (4); *Biccard* v. *Shepherd* (5); *Bouilton* v. *Lupton* (6); *Thompson* v. *Hopper* (7); *Tait* v. *Levi* (8); *Gibson* v. *Small* (9); and the American authorities, *Taylor* v. *Lowell* (10); *The Merchant Insurance Company* v. *Clapp* (11); the Civil Code of *Lower Canada*, Nos. 2490, 2491, 2505; *Arnould* on Mar. Assur. Vol. II. p. 664 [3rd Ed.]; *Tudor's* L. C. on Mer. and Mar. Law, p. 127 [2nd Ed.]

LORD PENZANCE:—

This is an appeal from the Court of Queen's Bench in *Canada*, and the question to be determined is, whether or not the Appellants, who are the Underwriters upon a Policy of Insurance, are, in the events that have happened, liable for the loss of the Vessel insured by that Policy?

The Policy was a Policy effected upon a printed form which was intended, as appears by many of its details, to have formed a Policy for river, and what may be called "inland navigation;" but the risk and duration of the Policy, as expressed upon the face of it, were "at and from *Montreal* to *Halifax*," in *Nova Scotia*, and it, therefore, appears to their Lordships to be practically a sea Policy as well as a river Policy.

The Vessel was warranted to sail on or before the 21st of November, 1864; and within the period mentioned in the Policy that Vessel, the *West*, left *Montreal* and proceeded down the river towards the Sea. In due time she arrived at *Quebec*, from *Quebec*

(1) 1 Camp. 1.
(2) 2 B. & Ald. 320.
(3) 3 Br. & B. 158.
(4) 5 M. & W. 414; S.C. 8 M. & W. 895.
(5) 14 Moore's P. C. Cases, 471, 494.
(6) 15 C. B. (N.S.) 113.
(7) 6 E. & B. 172, 937.
(8) 14 East, 481.
(9) 4 H. L. Ca. 419.
(10) 3 Mass. Rep. 330.
(11) 11 Pick. Rep. 56.

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she pursued her voyage, and very shortly after she found herself in salt water. The Boiler of the Vessel, which had at the time of her starting on her voyage a defect in it, became unmanageable. The defect which originally existed was aggravated by the increased pressure arising from the Vessel being in salt water; but, from whatever cause, the fact is undoubted that the Boiler, owing to the original defect, became then unmanageable. It ceased to do its work, and the Vessel was obliged to put into a neighbouring place to have the defect remedied before she could proceed on her voyage. The defect was remedied, but a considerable delay occurred before the voyage was resumed. This delay was caused partly by the state of the tides, and partly by the time necessarily consumed in repairing the existing defect; but eventually she sailed again. She met with bad weather, and was lost. The question is, whether the Underwriters, in these circumstances, are responsible for the loss that has occurred?

The Underwriters defend themselves upon the ground, that the Vessel was not seaworthy for her voyage when she sailed, and they point to this defect existing in the Boiler at that time, which undoubtedly asserted and established itself as a cause of unseaworthiness as soon as the Vessel was in salt water. This defence the Underwriters undoubtedly did put forward in very plain language, as it seems to their Lordships, upon their plea, or *défense au fonds en droit;* and it may be remarked in passing, that although it has been argued that the present Appellants did not intend to rely upon that defence, yet that does not seem to have been questioned in either of the Courts in *Canada.* That the defence was raised, and that it was properly raised, seems to have been taken for granted by everybody, including the two learned Judges who have delivered their judgments in favour of the Respondents in the Court below.

Now, it is undoubted, that the Vessel, from the fact of the Boiler being in the state in which it was found to be as soon as the Vessel entered salt water, was not fit to encounter the Seas, and for that reason, and that reason alone, she put in to repair. Well, then, can it be said that the Vessel sailed in a seaworthy state? The general proposition is not denied, that in voyage Policies there is an implication by law of a warranty of seaworthi-

ness, and it was not contended that the Vessel was seaworthy when she found herself in salt water; but it has been suggested that there is a different degree of seaworthiness required by law, according to the different stage or portion of the voyage which the Vessel successively has to pass through, and the difficulties she has to encounter; and no doubt that proposition is quite true.

The case of *Dixon* v. *Sadler* (1), and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has been equally well decided that the Vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.

It was argued that the obligation thus cast upon the Assured to procure and provide a proper condition and equipment of the Vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the Vessel enters upon that subsequent stage of the voyage which is supposed to require it.

Now, in this case, supposing there were any such subsequent stage as has been argued, and that there were any such necessity for a different equipment at one period of the voyage than that which existed at another, which is by no means plain, can it be said, that at the commencement of that portion of her voyage which was to be made in salt water, the Vessel was fit to encounter the perils of it, or in other words, was seaworthy?

It is plain that this could not be asserted with truth, because

(1) 5 M. & W. 414.

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from the moment that she entered the salt water the defect became apparent, and she was actually disabled by the action of the salt water upon the defective boiler.

It seems, therefore, to their Lordships, that the warranty of seaworthiness has not been complied with.

Two grounds have been taken by the Respondents as reasons why the Underwriters should, nevertheless, be held responsible. The first and main ground is one which it may be said, in passing, received no attention whatever either from the Counsel or from the Courts in *Canada*, namely, that in this particular Policy there is no warranty of seaworthiness to be implied. It is said that the language of this Policy is such, that the Court ought not to imply therefrom the ordinary warranty of seaworthiness. No doubt it is competent to parties by language in a contract to which, as an ordinary rule, the law attaches some implied condition, by express, pertinent, and apposite language to exclude that condition, and the question in this case is, whether the parties have done so? This, like all questions of contract, is a question of the intention of the parties. The law by which the warranty of seaworthiness is attached to the contract is a law known to the parties who make contracts of this description; and, therefore, they are prepared to understand that the implied warranty will be attached to the contract they are about to make. If, therefore, there is an intention to exclude that implied warranty, it ought to be expressed in plain language; but, upon looking at the language which it is argued has that effect in this case, there seems to their Lordships to be no reason whatever for saying that it was intended to have any such result. The enumeration of losses for which the Underwriter here declares that he will not be responsible, is one that may properly have been introduced for either one of two reasons: first of all, the Underwriter may have thought it right to say that, should a loss occur which he attributes to the condition of the Ship, he will not be placed in the position of being obliged to satisfy a Court or a jury that that loss was brought about by the Vessel being deficient in seaworthiness at the time when she sailed. He may wish to protect himself by stipulating, that when any loss is attempted to be brought home to him, he shall be at liberty to investigate

at once the immediate cause of that loss (quite irrespective of the time when the rottenness, or inherent defect, or unseaworthiness, arose), and be entitled to put his finger upon it, and say, "This is a loss that has not arisen by the pressure of the elements, but one which has in fact arisen from rottenness or inherent defect."

There is another reason why he may wish to have this enumeration included in the Policy without intending to disturb the well-known warranty that attaches to all Policies of this character; it is this—the warranty of seaworthiness would only protect him in case the defect exists at the time the Vessel sails on her voyage; but the language of the enumeration is quite wide enough to protect the Underwriters from losses of a similar character, although it is proved to demonstration that they did not arise till after the Vessel sailed. This enumeration of excepted losses, therefore, very largely enhances the protection of the Underwriters; and it is impossible to read this enumeration without seeing that the Underwriters were bent on being specially protected by the terms of this Policy. And if it be said, that the enumeration of excepted losses superseded the need of the warranty, as all losses arising from unseaworthiness, whether existing before or after the commencement of the voyage, are thereby excepted, the answer is obvious—that the warranty, if broken, exempts the Underwriters from loss by Fire or Pirates, or any other danger, though in no way referable to the unseaworthiness itself. It would seem, therefore, an odd conclusion to come to, to say that, where the Underwriters were bent upon special protection and exemption they should have intended to surrender the warranty of seaworthiness, which after all is the main protection to their interests.

It seems to their Lordships, therefore, that there is no pretence for saying that the language here used is such that the Court ought to conclude from it that the Underwriters intended to part with the protection which the law otherwise would have accorded.

The second ground taken by the Respondents is founded upon the language attributed to a great authority (Lord *Tenterden*), in the case of *Weir* v. *Aberdeen* (1), to the effect that if a defect, though it exists at the time the Vessel sailed, and exists to such an extent and is of such a character as to render the Vessel unsea-

(1) 2 B. & Ald. 323.

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worthy, be remedied before any loss arises, the Underwriters still remain responsible. This is a proposition of perilous latitude. It is impossible not to see that such a doctrine would tend, if carried to its legitimate consequences, to fritter away the value of this warranty altogether. It is all very well to talk of trivial and small things, but it is very difficult to define what should fall within the category of small or trivial things, and what should exceed it. It may, however, be safely observed, without going more narrowly into that subject, that the case of *Weir* v. *Aberdeen* (1) did not proceed upon the language that is attributed to Lord *Tenterden*—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the Underwriters had been aware of the unseaworthiness, and had assented to the Vessel putting back to the port to cure herself of the defect, and, therefore, they were held responsible. They had assented in writing on the Policy to maintain their liability notwithstanding the violation of the warranty. If the statements attributed to the Chief Justice were to be held to be the ground of decision in that case, the case itself would come in direct conflict with many other cases, and especially the case of *Forshaw* v. *Chabert* (2), in which a defect existed at the time the Vessel sailed, was completely remedied at *Jamaica*, the port into which the Vessel put for that purpose, and after the defect was completely remedied the Vessel was lost on the voyage from *Jamaica* to *Liverpool;* and yet the Underwriters were held not responsible.

For these reasons their Lordships think, that they ought humbly to advise Her Majesty to reverse this decision of the Court of Queen's Bench in *Lower Canada*, and their Lordships think that the reversal ought to be with costs. The judgment of the Court of appeal in *Lower Canada* appears to have given the costs in both Courts to the present Respondents. Their Lordships think that this portion also of the judgment ought to be reversed, and that the costs of both Courts in *Lower Canada*, as well as the costs of this appeal, ought to be paid by the present Respondents.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitor for the Respondents: *Roberts & Simpson.*

(1) 2 B. & Ald. 320. (2) 3 Br. & B. 158.

IN THE MATTER OF A MOTION BY HENRY HEBBERT, IN A CAUSE LATELY DEPENDING BETWEEN CHARLES JAMES ELPHINSTONE, OF BRIGHTON, IN THE COUNTY OF SUSSEX, DECEASED . . . . . } APPELLANT;

AND

THE REV. JOHN PURCHAS, CLERK . . . RESPONDENT.

J. C.*
1870
June 4.

IN AN APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical appeal—Abatement by death of Appellant—Revivor—Substitution of new Promoter—Judicial Committee, constitution of, under Church Discipline Act, 3 & 4 *Vict. c.* 86, *s.* 16.

In a suit instituted under the *Church Discipline Act*, 3 & 4 Vict. c. 86, against a Clerk in Holy Orders, a Minister of a Chapel without a District, by Letters of Request, the Promoter being a Parishioner of the Parish within which the Chapel was situated, for offences against the Laws Ecclesiastical by the use of certain rites and ceremonies set forth in the Articles exhibited; sentence was pronounced by the Arches Court against him upon some, but not on all, of the Articles. The Promoter of the suit appealed from such sentence to the Queen in Council, but, after Inhibition and Citation had issued, died. On a motion for the substitution of another Parishioner as Promoter of the appeal, who was not authorized by the Ordinary, or connected with the original Promoter, and had no personal or pecuniary interest in the subject matter of the suit:—

Held, that though the suit, as a Criminal suit, had determined by the death of the original Promoter, yet, having regard to the ancient practice of the Court of Delegates in such cases, and the peculiar circumstances of the suit, it was the duty of the Court of appeal not to permit its abatement, but to allow a proper person to be substituted in the place of the deceased Appellant, and to revive the appeal.

Semble, it is not necessary, in such circumstances, that the proposed substituted Promoter should be clothed with the character of one executing the Office of Judge at the instance of the Bishop, whose permission cannot be demanded *ex debito justitiæ*.

Quære, whether it is requisite, on a motion for the appointment of a new Promoter in an appeal under sect. 16 of the *Church Discipline Act*, that an Archbishop, or Bishop, being a Privy Councillor, should be present to render the Judicial Committee competent to entertain the motion.

THIS was a motion to revive the appeal, and for the substitution of *Henry Hebbert* of *Brighton*, in the County of *Sussex*, as Promoter

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of the Office of Judge in an appeal from a sentence pronounced by the Dean of the Arches Court of *Canterbury*, in a cause lately depending in that Court, promoted by *Charles James Elphinstone*, of *Brighton* (who died pending the appeal) against the Rev. *John Purchas*, Clerk, the Perpetual Curate or Minister of the Church or Chapel of *St. James*, at *Brighton*.

The cause was promoted in the Arches Court by Letters of Request from the late Lord Bishop of *Chichester*, and by the Articles, as admitted, the Rev. *John Purchas* was charged with various offences against the Laws Ecclesiastical.

Purchas did not appear, and the proceedings were carried on by default, and the Judge (The Right Hon. Sir *Robert Phillimore*), by his decree, pronounced that he had offended against the Laws Ecclesiastical with respect to some of the offences alleged, and admonished him accordingly, and further condemned him in certain costs.

The Promoter, *Elphinstone*, appealed from this decree upon grounds in his petition of appeal particularly alleged, upon which he complained that the Judge of the Court of Arches had omitted, or declined, to pronounce that the Rev. *John Purchas* had offended.

The appeal was filed, and the usual Inhibition and Citation issued and served on the Rev. *John Purchas* and the Registrar of the Arches Court, and were, on the 22nd of March, 1870, filed in the Registry. No appearance was entered by *Purchas*. *Elphinstone*, the Promoter and Appellant, died on the 30th of that month, whereupon *Hebbert* moved to be admitted and substituted as Promoter of the Office of the Judge in the appeal in the place and stead of *Elphinstone*, and a copy of the case in support of such motion, and notice thereof, having been served on *Purchas*, he appeared under protest, and denied that Her Majesty had any jurisdiction in the subject matter of the motion, and submitted that *Hebbert* was not entitled, under the circumstances of the case, to be admitted and substituted as such Promoter.

Affidavits were filed both by *Hebbert* and *Purchas* in support of, and in opposition to, the motion. *Hebbert* stated, that he had resided in *Brighton* since 1864, and was a member of the Church of *England*, and that he was well acquainted with the deceased Promoter of the suit; that he understood the particulars of the

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proceedings, and was interested therein, and felt that a speedy determination of the important points in question was desirable. He further stated, that he was willing and desirous to take upon himself the further prosecution of the cause, and to be substituted in the place of *Elphinstone*. He added, that he was for upwards of thirty years in the *Bombay* Civil Service, and that at the time of his retirement and resignation in 1863 he was one of the Judges of the High Court of Judicature at *Bombay*. *Purchas*, in his affidavit, stated that he had not appeared to defend the suit, having no pecuniary means to obtain professional assistance, and that the state of his health rendered it impossible for him to make his defence in person. He alleged, that *Hebbert* was not in the habit of attending the services at *St. James's Chapel*, and was not a member of his congregation; that the Chapel had no District assigned to it, and the persons who regularly frequented the services were satisfied with the manner in which they were conducted; and further, that *Hebbert* was in no way personally aggrieved, and had no interest in the matter, and that he, *Purchas*, believed the application was made without the knowledge of the present Bishop of *Chichester*, and also that the Executor of *Elphinstone* had declined to continue the suit, although pressed and invited by persons who were connected with the proceedings.

J. C.*
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June 27.

On the motion coming on, a preliminary objection was taken by the Appellant's Counsel, Mr. *A. J. Stephens*, Q.C., and Dr. *Tristram*, to the constitution of the Judicial Committee, there being no Archbishop or Bishop present, as provided by the 16th section of the *Church Discipline Act*, 3 & 4 Vict. c. 86; the proceedings in the Court below being taken under that Act, and the decree appealed from, though interlocutory, being in the nature of a definitive sentence. They contended, that if the application for the appointment of a new Promoter of the suit was not granted, the effect would be that the principal cause would stand dismissed, notwithstanding the merits, and the due assertion of the appeal. They suggested, also, that if the constitution of the Committee was informal, a prohibi-

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tion might be applied for against proceeding in the appeal, or against the execution of any Order that might be made thereon.

LORD CAIRNS:—

On the part of their Lordships, expressed some doubt as to the necessity of the presence of an Archbishop, or Bishop, on the Committee, the question for immediate decision not being the principal appeal, but a mere motion for the substitution of an Appellant, and the revival of the appeal; but intimated that their Lordships were of opinion, under the circumstances, that the motion should stand over for the attendance of one of the Ecclesiastical Members of the Committee.

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The motion, accordingly, was deferred, and now came on for hearing.

Mr. *A. J. Stephens*, Q.C., and Dr. *Tristram*, in support of the motion:—

This is a question which, as regards as well the interests of the Church as the administration of justice in Ecclesiastical Courts, is of very grave importance. The cause has abated by the death of the Appellant, the original Promoter of the suit. An appeal having been asserted, and the usual Inhibition and Citation issued, the Court below has lost all control of the cause, and this Tribunal alone has cognizance of it. In Ecclesiastical causes the appellate Tribunal has original as well as appellate jurisdiction; whatever, therefore, the Court below might do in such circumstances, this Committee may. It is virtually an abatement of the appeal, and in such circumstances this Court, even though the cause be in the nature of a criminal proceeding, has revived the appeal by permitting a new Promoter: *The Dean of Jersey* v. *The Rector of* —— (1). There, in a criminal proceeding by a deceased Dean against a Clerk in Orders, the appeal was revived, and allowed to be prosecuted by his Official successor. So in *Liddell* v. *Beal* (2), the substitution of a new Churchwarden in the place of the one who was

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(1) 3 Moore's P. C. Cases, 229.

(2) 14 Moore's P. C. Cases, 1.

the original Promoter of the suit, was ordered by this Committee. Now, the proceedings in this case are for the benefit of the Church, to enforce uniformity of practice in its public worship. The present suit in Ecclesiastical law is a Criminal suit, but the Promoter or Prosecutor of the suit has no personal interest; though if he had, the suit would not be determined, for, by analogy to the Criminal law, as it is laid down in *Chitty's* Criminal Law, vol. i. p. 2 [2nd Ed.], "though the original Prosecutor die, the proceedings will not be defeated in a case of libel, or assault, or other injury of a private nature, because they are professedly instituted, not for the satisfaction of wrongs to individuals, but for furtherance of public justice," and he cites *Rex* v. *Ellers* (1), where it was held, that a person indicted for insulting a Justice of the Peace shall not be discharged from the prosecution, although the Justice be dead. The same practice prevails in the Court of Chancery in proceedings by the Attorney-General at the information of a Relator. If the Relator dies, a new one in his place is, as of course, appointed: *Mitford* on Pleading, p. 100. So, where a Relator in a *quo warranto* being absent, and unable to enter into the recognizances required by the Statute, 4 & 5 W. & M. c. 18, s. 2, another Relator may be appointed: *Rex* v. *Quayle* (2). The promotion of the office of Judge in Ecclesiastical causes is founded on the Canon Law, and has been adopted in lieu of the ancient form of proceeding by Inquisition: *Ayliffe's Parergon*, p. 396; Archdeacon *Hale's* Precedents in Criminal causes illustrative of the discipline of the Church of *England*, p. lviii.; *Cockburn's* Clerk's Assistant, p. 102. There is no reported case in point, so we must look to the records of Ecclesiastical causes for precedents; and to the Court of Delegates, the Court of appeal in such causes since the Reformation, to furnish a guide for the practice. There are no regular reports of cases before the Delegates, but in a Parliamentary return of appeals in causes of Doctrine or Discipline made to the High Court of Delegates, from its erection by the Statute, 25 Hen. 8, c. 19, A. D. 1533, until its abolition by the Statute, 2 & 3 Will. 4, c. 92, in 1832 (3), several instances are to be found of suits and appeals abated and revived, both in the Arches Court and the Court of Delegates,

(1) 1 Wils. 222. (2) 9 Dowl. 548.
(3) Records collected by Mr. Rothery, Registrar; Parl. Papers, 3rd April, 1868.

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which this Court now represents, by the substitution of a new Promoter in the place of the original Promoter. Thus in 1808, in a suit in the Arches Court against Churchwardens for making alterations in the Parish Church, promoted by the Mayor of *Dover*, who, it appeared, died while the suit was pending, the Court admitted the successor of the Mayor to prosecute the cause (1), so in a criminal prosecution for defamation, the original Promoter, *Hobday*, having died pending the appeal to the Arches Court, it was contended on the part of *Jackson*, the Respondent, that the suit had died with the Promoter, but his Widow and Executrix was made a party in his stead, by Order of that Court: *Hobday* v. *Jackson*, 1667 (2). Again, in *Thorpe* v. *Plaxton* (3), where a suit was brought in the Consistory Court of *York*, for correction of a Clerk for drunkenness and neglect of duty, it appears, that after appeal to the Court of Delegates the Promoter died, and upon objection being taken that Court assigned the cause for hearing (*ad informandum in jure*) on the legal question, "whether by Law the office of Ordinary has not such a concern in all prosecutions of a spiritual nature, that a proper Promoter may be permitted on any emergency to carry on the cause, either in the first instance or on appeal." This was in 1730, and is the very question here; but it does not appear to have been solemnly determined, for the Inhibition on appeal was relaxed, on the ground, as it is stated, that the Promoter had died before the Inhibition and Citation were returned. The opinion of the Court of Delegates is, however, sufficiently apparent from the course taken by them. So in *Sharpe* v. *White*, in 1626 (4), which was also an appeal to the Delegates, it appears that while the cause was pending before the Delegates, *White*, the Respondent and original Promoter, died, and one *Robert Evans*, his Executor, applied to be admitted in his stead. The application was opposed by *Sharpe's* Proctor, who contended, that *Evans* had no interest in the cause, but the objection seems to have been overruled, and the Court afterwards pronounced sentence in the cause. That is a case directly in point. In *Wilson* v. *Hancock*, in 1671 (5), the original Promoter in the cause having refused to proceed further after appeal to the Arches Court, a new Promoter

(1) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 183, p. 92.
(2) Ibid. No. 54, p. 24.
(3) Ibid. No. 150, p. 73.
(4) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 28, p. 11
(5) Ibid. No. 66, p. 30.

was assigned, and the Court proceeded with the cause; and again, in 1696, in *Harris* v. *Twittey* (1), *Twittey*, the Promoter, being confined in gaol, one *Hearne* was admitted by the Court of Delegates as a new Promoter, and sentence was pronounced against him, as well as the original Promoter. These cases, though not so fully recorded as might be desirable, are conclusive to shew, that the jurisdiction we contend for was used and exercised by the Court of Delegates, and if so, it is possessed by this Tribunal, to whom all the functions and authority of the Court of Delegates is transferred by Statute. There is no pretence for saying that Mr. *Hebbert* is not a proper person to be appointed Promoter in the suit.

The *Solicitor General* (Sir *John D. Coleridge*), and Mr. *Arthur Charles*, for the Respondent:—

The suit of "*Elphinstone* v. *Purchas*" was abated by the death of the Promoter, and cannot be revived. The personal representatives of the Promoter having no interest in the cause, cannot, even if willing, revive it. How, then, can the present Applicant, who has no pecuniary interest, and who was not on the death of the Promoter clothed with any official character? The consent of the Bishop of the Diocese is essential to the institution of the suit, and must, therefore, be taken to be, to its continuance. In *Reg.* v. *The Bishop of Chichester* (2) the Court of Queen's Bench held, that under the 3 & 4 Vict. c. 86, s. 3, the Bishop had a discretion, and refused to issue a mandamus upon the application of a stranger to the Church and Diocesan. There is no evidence that the present Diocesan, who is a different person from the Bishop who allowed his office to be promoted in the first instance, is a consenting party to the continuance of these proceedings; it is believed he is the reverse, but whether willing or unwilling to continue this prosecution, he cannot do so except by a fresh proceeding, and allowing his Office to be promoted in a new suit. No instance is to be found in the parliamentary return referred to, of a Bishop intervening upon an appeal for the purpose of continuing the suit. After the allowance of his office for the prosecution of the suit, the Bishop ceases to have any interest or concern in it, he is *functus officio*. In *Northey* v. *Cock* (3) the

(1) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 102, p. 48.
(2) 2 E. & E. 209. (3) 1 Add. 326.

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principles by which the Ecclesiastical Courts are governed in granting administration pending suit are fully treated. *Grant* v. *Atkinson* (1) is an illustration of the practice. There the suit would have abated had not the proxy included the surviving Executor. Again, in *Cheale* v. *Cheale* (2) the suit abated by the death of the Wife in a suit by her against her Husband, but the Court would not direct the costs incurred by her to be paid by the Husband. There must be either a pecuniary interest, some representative character, or personal liability: *Sherwood* v. *Ray* (3). The cases cited from the Parliamentary return do not warrant the present application. The case of the allowance of the Mayor of *Dover* to prosecute a suit brought by a previous Mayor is not applicable; it was a suit by a Corporation, which never dies. The Promoter sued in his official character, not, as in this case, in his individual capacity. In the case of *Hobday* v. *Jackson* (4), it is said, that the Widow of the original Promoter was made a party in his stead, yet it appears to have been with the consent of the Respondent, in whose favour the ultimate decision on the appeal was; whereas, in the case of *Thorpe* v. *Plaxton* (5), the question put for the information of the Court, shews at once the doubt that existed at that time, in 1730, upon the point; and in the other case cited of *Sharpe* v. *White* (6), of the substitution of an Executor, it is said only that the objection to his want of interest in the suit seems to have been overruled. These are the only precedents to be found, and they none of them establish the position insisted on by the Counsel for the Appellant, that this Court has jurisdiction to substitute a new Promoter where the appeal has abated by the death of the original one. *The Dean of Jersey* v. *The Rector of* —— (7), and the case of *Liddell* v. *Beal* (8), before this Tribunal, are similar to the *Mayor of Dover's Case* (9), they were cases of persons clothed with an official character, and quite distinct from the questions where only individuals in their personal characters are concerned. The case of a common Informer is analogous to that before the Court; if the Informer dies the prosecution is at an end. With

(1) 1 Lee, 168.
(2) 1 Hagg. Ecc. Cases, 374.
(3) 1 Moore's P. C. Cases, 353.
(4) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 54, p. 24.
(5) Ibid. No. 150, p. 73.
(6) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 28, p. 11.
(7) 3 Moore's P. C. Cases, 229.
(8) 14 Ibid. 1.
(9) Records collected by Mr. Rothery, Registrar; Parl. Papers, No. 183, p. 92

regard to the Applicant proposed to be substituted as Promoter in the suit, though there may be no personal objection to him, yet he has no interest either in the matter of the suit, or in the Chapel of which Mr. *Purchas* is the Incumbent. Mr. *Hebbert* is not one of the Congregation, and the Chapel of *St. James* is not a Parochial, or even a District, Church.

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Judgment having been reserved was afterwards delivered by SIR R. PHILLIMORE :—

1870 *July* 14.

This was a cause of the Office of the Judge promoted by Colonel *Charles James Elphinstone*, a Parishioner of *Brighton*, against the Rev. *John Purchas*, Perpetual Curate of the Chapel of *St. James* in that Borough. The Lord Bishop of *Chichester* sent the case, in the first instance, by Letters of Request, to be tried in the Court of Arches. Mr. *Purchas* was charged with having offended against the Laws Ecclesiastical by the use of certain rites and ceremonies which were set forth in the criminal Articles exhibited against him. Mr. *Purchas* did not appear in that Court, and the cause was heard *in pœnam*. The Dean of the Arches pronounced that Mr. *Purchas* had offended against the Law with respect to some of the charges, admonished him to abstain from the use of certain rites and ceremonies which were the subject of those charges, decreed a Monition to issue against him, and condemned him in the costs incurred by the proof of those charges. But with respect to the charges contained in other Articles, the Court held that they were not proved, and declined to admonish Mr. *Purchas*, or issue any Monition with respect to them.

From this sentence the Promoter appealed on the 16th of February, 1870; and, having extracted the usual Inhibition and Citation, served them on Mr. *Purchas* on the 26th of February, and on the Registrar of the Arches Court on the 28th of February.

On the 22nd of March the Inhibition and Citation were returned, and the process of the Arches Court was filed in the Registry of this Court. On the 30th of March the Promoter died.

On the 20th of April, Mr. *Hebbert*, a Parishioner of *Brighton*, executed a proxy authorizing the Proctors of the late Promoter to carry on the proceedings in his name and on his behalf; and they now pray their Lordships that Mr. *Hebbert* may be admitted

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and substituted as a Promoter in the place of the late *Charles James Elphinstone.*

Mr. *Purchas,* being served with a notice of this motion, has appeared by Counsel before their Lordships, and contended that the suit was determined by the death of the Promoter, and ought not to be revived, and that Mr. *Hebbert* ought not to be substituted as a Promoter.

4 P.D. 593.

It was admitted, on the one hand, by the prayer of Mr. *Hebbert,* what indeed could not be disputed, that the Criminal suit had abated by the death of the Promoter; and it was admitted, on the other hand, by the Counsel for Mr. *Purchas,* that the suit could be revived by the substitution of a Promoter of a particular character. The principal question which has arisen for their Lordships' consideration is, whether the substituted Promoter must be clothed with that particular character, or whether it be not *ex debito justitiæ* to admit any proper person who applies to the Court for permission to carry on the suit; and, if this be so, there remains the subordinate question whether Mr. *Hebbert* be a proper person.

In order to give a satisfactory answer to the first question, it becomes necessary to make some observations as to the nature of the suit. All criminal proceedings in the Ecclesiastical Courts are carried on, in a certain sense, by the exercise of the Office of the Judge: it may be exercised in two ways by the Ordinary—that is, by the Judge himself, *ex officio mero,* or by the Judge at the instance of another party, *ex officio promoto.* The proceedings in this case belong to the latter category. It was decided by their Lordships in the case of *Sherwood* v. *Ray* (1), which was one of great importance, and very carefully considered by the eminent Judges who sat upon it, among whom was Sir *John Nicholl,* perfectly acquainted with the practice of the Ecclesiastical Courts, that the promotion of the Office of the Judge, though generally permitted as a matter of course, cannot be demanded *ex debito justitiæ.*

Subsequently to this decision, the Statute, 3 & 4 Vict. c. 86, was passed. By the 13th section it was enacted "that it shall be lawful for the Bishop, if he shall think fit," either to issue a Commission of Inquiry, or, in the first instance, to send the case by Letters of Request to the Superior Court. In the case of *Reg.* v.

(1) 1 Moore's P. C. Cases, 397.

The Archbishop of Canterbury (1), the Queen's Bench held that, when the Bishop had once issued a Commission at the instance of a Promoter, the Bishop could not refuse to allow his Office to be further promoted.

In the case of *Reg.* v. *The Bishop of Chichester* (2), the Queen's Bench refused to compel by Mandamus the issue of a Commission of inquiry, at the instance of a person who was unconnected with the Parish or Diocese; and Mr. Justice *Wightman* expressed a strong opinion that, under the general law, and under the words of the Statute, the Bishop had an absolute discretion to allow or refuse his Office to be promoted in the first instance.

In the present instance, however, it appears that the local Ordinary, the Bishop of *Chichester*, thought both that the cause was one which, on the ground of public interest, ought to be instituted, and also that a proper person had applied for leave to promote the office of Judge. He, moreover, availed himself of the provision of the Statute to send the case by Letters of Request to be tried in the Superior Court of the Province.

Having taken this course, it was not competent to His Lordship, according to the decision to which we have referred, to stay or prevent the further prosecution of the suit. The Court of the Province had alone jurisdiction over the matter, while the Trial was pending before it; and this appellate Court having duly inhibited the Court below, and duly cited the Defendant to appear before it, has now exclusive jurisdiction over the suit. To this Court, therefore, the application has been properly made.

The precedents on the subject are not numerous; they are principally furnished from the Records of the Court of Delegates, whose authority has been transferred to this Tribunal. It was not the habit of the Delegates to deliver reasons for their judgment; and there are no printed reports of the cases which they decided, or of the arguments of Counsel which were addressed to them. It is, however, to be collected from the records with which their Lordships have been furnished by the industry and research of the Registrar of Ecclesiastical and Maritime appeals, that suits which have abated by reason of the death of the Promoter have been revived by the appointment of a new Promoter in several cases in

(1) 6 E. & B. 546. 5 Jur. N. S. 958 (2) 2 E. & E. 209. 6 Jur. N. S. 820

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which the Promoter was Respondent and died pending the appeal. In these cases the Executor of the original Promoter appears to have been substituted as a new Promoter, on the ground probably of his having an interest in the costs which the Testator Promoter had obtained by the judgment appealed from; and on the same principle the Executors of the Promoter have been allowed to take out a monition to enforce a decree for costs already obtained.

There are also cases, both in the Delegates and in the Court of Arches, in which an Appellant Promoter, who was an official person, a Churchwarden in one case and a Mayor in the other, having died pending the appeal, a new official Promoter was appointed by the Court. It is true that in the year 1731, in the case of *Thorpe* v. *Plaxton* (1), on an appeal from the Consistory of *York* before the Delegates, the Promoter having died pending the appeal, the Delegates assigned the cause for hearing (*ad informandum in jure*) on the legal question, "whether by law the office of the Ordinary has not such a concern in all prosecutions of a spiritual nature that a proper Promoter may be permitted on any emergency to carry on the cause either in the first instance or the appeal?" Eventually they dismissed the appeal, but on the special ground, that the Promoter had died before the Inhibition and Citation were returned; in other words, the jurisdiction of the Court appealed from remained, and the jurisdiction of the appellate Court was never founded, as it has been in the case which is being now considered.

Their Lordships are unable to discover any sound distinction in principle between these precedents and the case which is now before us. There seems no good ground for the proposition that the power of the Court to appoint a new Promoter is limited to the two categories of a deceased Promoter whose representative has a pecuniary interest, or of a deceased Promoter who was clothed with an official character.

The cases of *The Dean of Jersey* v. *The Rector of* ——— (2), and *Liddell* v. *Beal* (3), decided in this Court, and that of *The Bishop of Winchester* v. *Wix* (4), decided in the Court of Arches, though

(1) Parl. Papers, 3rd April, 1868, No. 199, p. 73.

(2) 3 Moore's P. C. Cases, 229.

(3) 14 Ibid. 1.

(4) Law Rep. 3 A. & E. 19.

in some respects distinguishable from the present, tend to support the principle of the substitution of a new Promoter where the former one has died during the progress of the suit.

Criminal Ecclesiastical suits ought not to be, and, it must be presumed, would not be allowed to be, instituted in the first instance by the Ordinary, who has full control *in limine* over the subject, unless the public interest requires their institution. But it would be a great evil if, after the due institution, under proper authority, of such suits, the course of justice with respect to them could be arrested on any technical or formal ground.

If this were the legal doctrine, an immoral or heretical Clerk in Holy Orders might escape a sentence against him which the welfare of the Church demanded, because the Promoter of the office, happening to be a private person, had died before the cause was tried. We are satisfied that such a doctrine is contrary to the analogy to be derived from other systems of law in this country, and is not founded on the practice or principle of Ecclesiastical Law, when thoroughly examined and properly understood.

We are of opinion, therefore, that it is the duty of the Court before which proceedings are pending when the Promoter dies, to allow a proper Promoter to be substituted in his place.

The subordinate question only remains, whether Mr. *Hebbert*, who is proposed as the new Promoter, be a proper person to discharge that office.

In deciding this point we are not embarrassed by the consideration, whether the personal representative of Colonel *Elphinstone* might not have a prior claim, if he desired it, to this office. No such personal representative is before us, or has made any application to this Court. Indeed, it would appear that he has no intention of doing so.

It appears to their Lordships that Mr. *Hebbert*, a Parishioner of *Brighton*, is a proper person to be substituted as a Promoter in this case. And they will humbly tender to Her Majesty, in a proper form, their advice to this effect.

Proctors for Appellant: *Brooks & Co.*
Proctors for Respondent: *Moore & Currey.*

J. C.*
1870
July 5.

VINCENZO BUGEJA AND LUIGI PULLICINO . . . . . } APPELLANTS;

AND

FRANCESCO CAMILLERI AND ROSA CAMILLERI . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE ISLAND OF MALTA.

Law of Malta—Ordinances and Code—Succession by intestacy—Co-heirs—Suit for partition—Decree for sale of entirety.

According to the law of *Malta*, the real estate of an intestate is equally divisible among the co-heirs.

By the Ordinances and Code in force in the Island, where property possessed in common cannot be "conveniently divided, and without disadvantage," the same must be sold by auction.

In a suit for the partition of a Villa residence with outhouses and ornamental grounds, which had devolved by the intestacy of its late owner on his ten children, and which, in the opinion of the Court below, after reference to Experts, could not be so divided: the decree made therein for a sale by auction in its entirety, and the subsequent division of the amount realized in equal shares, confirmed by the Judicial Committee.

Semble, it is not competent for the parties in such a suit to propose, at the hearing of the appeal, a fresh reference to Experts for the purpose of suggesting another scheme for the division of the property in litigation.

THE suits in respect of which the decree appealed from was pronounced arose under the following circumstances:—

Count *Luigi Preziosi*, of the Island of *Malta*, died in the year 1852, intestate, leaving ten children, one of whom was the Respondent *Rosa*, the Wife of the Respondent, *Francesco Camilleri*. The Count was at the time of his death possessed, among other property, of a certain tenement, with garden and lands adjoining, known as *Villa Preziosi*, situate in the Island, to which tenement the ten children became entitled in equal shares.

Seven of the children subsequently sold their individual tenth shares to the Respondents, *Francesco Camilleri* and his Wife, *Rosa*, who were consequently the proprietors of eight of such tenth shares.

* *Present*:—LORD CAIRNS, SIR WILLIAM ERLE, and SIR JAMES WILLIAM COLVILE.

One of the remaining tenth shares was afterwards purchased by the Appellant, *Bugeja*, and the other passed by marriage to the Appellant, *Pullicino*.

On the 19th of June, 1866, the Appellant, *Bugeja*, instituted a suit against the Respondents and the Appellant, *Pullicino*, with his Wife, *Mathilde*, in the First Hall of Her Majesty's Civil Court in the Island, calling on them to shew cause why the Court should not order a partition of the *Villa Preziosi*, by the assignment of a tenth part thereof to *Bugeja*, another tenth part thereof to the Defendant, *Pullicino*, and the remaining eight tenth parts to the Defendants, *Camilleri* (the Respondents), in such manner as should be deemed just, after examination and plan of land Surveyors to be appointed for that purpose.

On the 21st of the same month the Respondent, *Camilleri*, in the name of his Wife, *Rosa*, also commenced a suit against the Appellants, as well as the Wife of the Appellant, *Pullicino*, in the First Hall of the Civil Court in *Malta*, calling on them to shew cause why, after it being declared that the *Villa Preziosi* could not be conveniently divided and without disadvantage, the Court should not Order the sale by auction (*licitatio*) of the *Villa Preziosi*, to be effected in the mode and according to the formalities laid down by the law then in force, with costs.

The Court decreed on the 1st of October, 1866, that the two suits should be heard simultaneously, and be decided by one sentence, and on the 8th of October, 1866, the Court, appointed three land Surveyors to examine and report on the partition of the *Villa Preziosi*.

The Surveyors so appointed subsequently made their reports, two of them being in favour of a partition of the property, and the third, opposed to a partition thereof.

The VI. Ordinance of 1859, enacted by the Governor of *Malta*, with the advice and consent of the Council of Government, and intituled "No. VI., to amend and consolidate the laws relative to contracts of purchase and sale, and to contracts of exchange," contains the following, amongst other provisions referred to in the judgments hereinafter mentioned.

Article 99.—"If a common thing cannot be conveniently divided, and without disadvantage, or if in a partition of common

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property made by mutual consent, there be something which no one of the sharers can have or wish to have, the same are sold by auction.

"*Licitation*, when it takes place, can be demanded by any of the co-proprietors, whatever his share may be in the thing."

Article 100.—"Each of the co-proprietors may demand that strangers be invited to *licitation*."

Article 103.—"The *licitation*, when it takes place by a decree or by a sentence of the Court, is made in the presence of the Registrar of the said Court, according to the rules laid down for auctions, in so far as such rules may be applicable thereto, and unless the Court shall deem fit for the interest of the parties to deviate from such rules.

"The adjudication made by the Registrar is equivalent to a contract of sale, even in cases of immoveable property or of property considered as immoveable.

"The co-proprietors may, when no one of them is a minor or a person otherwise subject to curatorship, have the *licitation* which may have been ordered by the Court effected by means of a Notary or any other person; but in such cases, with regard to the execution of the sale, the provision contained in Article 101 shall apply."

On the 30th of January, 1868, the First Hall of the Civil Court gave the following judgment:—"The Court, having seen the discrepant reports of the land Surveyors appointed by a decree of the 8th of October, 1866; having held a formal inspection on the spot, and heard the Counsel for *Bugeja*, *Camilleri*, and the Husband and Wife *Pullicino*, on the two citations joined together for hearing, in virtue of a decree of the 1st of October, 1866, considers, that, according to the opinion of *Troplong* on Sales, at No. 861, although the Tribunals in regard to demands for divisions or sales by auction (*licitatio*) consult land Surveyors; they are not, however, compelled to confirm their report, and this is supposed when the land Surveyors agree in their opinion, and, therefore, much more the Court is not compelled to follow the opinion of the land Surveyors when they differ on the principal points. That this latitude of the Court is sanctioned by Art. 689 of the "Laws and Organization of Civil Procedure," and, therefore, the Court, availing itself of the facts

arising from the discrepant reports and of what it remarked at the inspection held on the spot, has had in view the provision of the law which, at Art. 99 of Ordinance No. VI. of 1859, enacts that there is room for a sale by auction whenever the thing possessed in common cannot be divided conveniently and without disadvantage. That according to *Troplong*, at No. 860, in order that the sale by auction may be allowed, it is necessary that a division should injure the thing, and prove prejudicial to all the parties. That the separation of two tenth parts of the *Villa Preziosi* could be conveniently made if for the division it were only necessary to close apertures of communication and open others, without raising walls separating gardens, which should be of not an indifferent height and of some extent, and without excavating water reservoirs and other works which it would be necessary to construct in the present case, and which would include cisterns not permitted by law. That the separation asked for would cause disadvantage and detriment, because it cannot be denied that the tenement in question is really grand, inasmuch as everything requisite for qualifying it as such is found in it, and it is so because it is now entire, and depriving it of any of its parts it would necessarily lose that qualification. That it is not an available plea that originally it was not composed of all its present parts, because it is certain that at one time there was no Villa, and that whoever had proposed to form the entire tenement as at present exists must have been compelled to acquire neighbouring property in order to join it with his own and form one tenement. If it be now, therefore, wished to again separate the parts added, the whole would be depreciated, and the remainder would be reduced to that depreciation which the ancestors of the present owners wished to avoid. That it is also a disadvantage that one of the joint owners should be compelled to the payment of several hundreds of *scudi* for equalizing the value of the shares—a fact which would be tantamount to oblige him to purchase property to that amount. That to have to narrow a door, or excavate its jamb into the wall of a drawing room, and to permit servitudes of windows, or deprive the rooms of light, would be another disadvantage. Therefore, declares and decides, that the *Villa Preziosi* cannot be divided, as asked for by *Bugeja*, and that consequently its sale by auction (*licitatio*) must be effected

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in the presence of the Registrar of this Court, or the person appointed by him according to the regulations established for auctions; a new valuation for that Villa being dispensed with, as in its stead will suffice the one prepared by the land Surveyors appointed by this Court, amounting to 25,363 *scudi*." The Court, however, declared, that the tenth part of the price belonging to the Husband and Wife, *Pullicino*, must, as it is *dotal*, be deposited in Court, to be disposed of as may be determined by the Court of voluntary jurisdiction. And in the preceding manner the Court rejected the demands contained in the citation of *Bugeja*, and complied with those put forward in the citation of *Francesco Camilleri* (*maritali nomine*). All the costs were directed to be borne by the parties according to their respective interests.

The Appellant, *Bugeja*, on his own behalf, and the Appellant *Pullicino* on behalf of his Wife, *Mathilde*, appealed to the Second Hall of the Court of appeal from this, except in regard of that portion of the judgment which directed the costs to be paid by the parties in proportion to their respective interests.

The Respondents, *Camilleri* and *Rosa* his Wife, also appealed to the Second Hall of the Court of appeal from that judgment with regard to the head of costs only, and prayed that the judgment might be confirmed with regard to the merits, and reformed and revoked in respect to the head of costs, and that the Respondents should be exonerated from the payment of all the costs, and the adverse parties be condemned to the payment thereof.

On the 29th of April, 1868, the Second Hall decided for the confirmation of the judgment delivered by the First Hall on the 30th of January, 1868, declaring that, for the reasons of fact expressed in the Report of the land Surveyor, *Egidio Lapira*, published on the 22nd of October, 1867, and from which it appeared in a satisfactory manner that the tenement to which the judgment appealed from alludes, could not be divided conveniently and without disadvantage, and applying Arts. 99, 100, and 103 of Ordinance No. VI. of 1859 to the case, decided for the confirmation of the judgment delivered by the First Hall of Her Majesty's Civil Court on the 30th of January, 1868, with this, however, that strangers may be also invited to the *licitation* contemplated in

the judgment according to the demand made by the Appellants in this secondary instance; the costs of first instance not to be taxed amongst the contending parties, with the exception of the fees due to the land Surveyors and the Registry, to be liquidated in proportion of the respective interests of the parties; and the costs of the secondary instance to be paid by the Appellants."

The Appellants, *Bugeja* and *Pullicino*, presented their petition to the Second Hall, praying leave to appeal from this judgment to Her Majesty in Council. *Mathilde Pullicino*, the Wife of *Luigi Pullicino*, however, protested against such appeal.

On the 15th of June, 1868, the Second Hall of appeal gave the Appellants leave to appeal to Her Majesty in Council, declaring that in consequence of the above protest *Mathilde Pullicino* was no longer a party to the suit.

Mr. *Dickinson*, Q.C., and Mr. *Haynes*, for the Appellants :—

In this suit the rights of the parties must be determined by the law of *Malta* to be found in the Ordinances and Codes. By the law as there defined, every co-proprietor of common property has a *primâ facie* right to a partition or division in kind of such property. Such right can only be defeated by some other co-proprietor establishing to the satisfaction of the Court that such common property cannot be partitioned or divided in kind conveniently and without disadvantage to the entire property, or depreciation in the value to the prejudice of all the co-proprietors. The Ordinance which was applicable to the question of partition in this case was Ordinance, No. IV., of 1864, ch. iii., "Of partition," the 316th and following Articles. Ordinance, No. IV., of 1864, Arts. 315, 316, and 321, require the concurrence of two qualities or circumstances in order that a division may be considered to be legally carried out, namely, first, that the separation may be conveniently made; and, secondly, that the separation should cause no disadvantage. Art. 310 of the Code of *Malta*, which is taken from the French Code Civil, Art. 816, contains the same provisions. The scheme recommended by the majority of the land Surveyors consulted was capable of being carried out consistently with these principles, and the Court of appeal was not justified in adopting, as it did, the report of the dissentient land Surveyor, without either directing

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an investigation by other land Surveyors, or an inspection of the property by the Court itself, which it refused. The application by the Civil Court, which was adopted by the Court of appeal, of the provisions of the Ordinance, No. VI., of 1859, that there is authority for a sale by auction whenever the thing possessed in common cannot be divided conveniently and without disadvantage, was at least premature, and quite contrary to the opinion of the majority of the Surveyors. There was no such inconvenience in the partition as would justify *licitation*: *Troplong, De la Vente, Tom.* vi., p. 361, *De la Licitation*, Arts. 1686-7, pl. 859, 863-4-5; *Merlin, Rep. de Jur., Tom.* 17 and 18, p. 306-7, tit. "*Licitation.*"

Sir *R. Palmer*, Q.C., and Mr. *Archibald*, for the Respondents, were not called upon.

LORD CAIRNS:—

In this case a Villa in *Malta*, apparently in the neighbourhood of a Town, consisting of an ornamental residence, certain out-buildings, gardens, and some pieces of land, which either were ornamental to, or contributed to the view and amenities of, the Villa, devolved some time since, upon the death of the Owner, who had occupied the Villa in this condition, upon his ten children. In that state of things if an application had been made upon the subject of partition, it is difficult to see how the Villa could have been divided into ten portions without that inconvenience and disadvantage which by the Code of *Malta* are considered an objection to specific partition. In the course of years, however, the shares of eight of these children appear to have centred in the Respondent, the Appellants being entitled, each of the two, to one-tenth, the shares of two other children; and the Appellants contend, that the Villa and property may now be divided without inconvenience and without disadvantage in the proportions which have been mentioned, namely, eight-tenths to the Respondent, and one-tenth to each of the Appellants.

That depends upon the construction of the Maltese Code to which reference has been made: "If a common thing cannot be conveniently divided and without disadvantage, or if in a partition of common property made by mutual consent there be something

which no one of the sharers can have or wish to have, the same are sold by auction." It is unnecessary to refer to the Code of 1864 in addition to this, which is the Code of 1859, because the Code of 1864 in substance throws us back on the Code of 1859.

The question, then, to be determined is, could partition, under the circumstances of this case, be made conveniently, and be made without disadvantage? Of course that is a question to be solved in the exercise of a judicial discretion, after all the evidence has been adduced of which the case is susceptible; but their Lordships would, under any circumstances, be extremely slow to differ from the exercise of that judicial discretion by the Court upon the spot, especially if their Lordships were satisfied that that Court had all the evidence before it which was relevant to the case, and, above all, found that the Court or members of the Court had had the advantage, which their Lordships cannot have, of personally inspecting the property with regard to which the question has arisen.

In this case three Experts, as they are termed, were in the first instance appointed; one, as we understand, by each of the parties who are in contest, a mode of appointment which gave two of the three to the Appellants, and one to the Respondents. Those Experts made their report, stating a certain number of facts and their opinion with reference to them, and the two Experts who were appointed at the instance of the Appellants stated a certain mode in which they thought the property might be divided; but the Expert who was appointed by the Respondents stated his opinion to be against the possibility of division without inconvenience and without disadvantage. Then the Judge of First Instance, with these reports before him, and with the advantage of the presence of the Experts, visited, as it appears, the property in question, and that learned Judge also arrived at the conclusion, that the property could not be divided specifically without inconvenience and without disadvantage.

From that decision there was an appeal to the Court of appeal in the Island, and the Court of appeal, in substance, confirmed the judgment of the primary Judge, adding their own adhesion to the facts stated by the Expert who had been appointed at the instance of the Respondents, and dismissing, therefore, the appeal which

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had been made to them. In that state of things some case of error would require to be very clearly established to induce their Lordships to come to a conclusion which in the main must be a conclusion of fact differing from the Judge of First Instance, and from the majority of the Court of appeal.

Their Lordships, however, might be obliged to come to a different conclusion, if it were clearly made out to their satisfaction, that those judgments proceeded upon erroneous grounds; but so far from being satisfied that this has been the case, their Lordships are of opinion, that if this scheme of division, which was suggested by the two Experts who were in the majority, is looked at, it is a scheme which clearly would entail that inconvenience and disadvantage which are struck at by the Code; for their Lordships find that this scheme of division would involve, in the first place, the allotment to one person of out-buildings clearly useful for the enjoyment of the portions of arable land, which arable land, by the same scheme, would be allotted to a different person. The scheme would also involve the construction of works, the interference with existing lights, serious operations for the purpose of securing or preserving a supply of water; and, in addition to all that, payments of considerable amount, by way of equality of partition.

Now, the necessity in any scheme of partition, of those acts and payments to which reference has been made, has always, by all commentators upon the passages in the Code Civil which tally with the *Maltese* Code, been considered one of the obstacles to partition *in specie* which ought to prevent that partition taking place. Therefore, if their Lordships' attention were confined to that scheme so propounded, their opinion would be entirely in accordance with that of the primary Judge, and with the Court of appeal in the Island.

But then it is said by the learned Counsel who have argued the case with great ability on behalf of the Appellants, that even although they themselves would scarcely be prepared to maintain the scheme propounded by these two Experts, yet it by no means follows that there may not be some other scheme, according to which the property might be divided, and which might be free from the objections which have been mentioned.

Their Lordships entertain very strongly the opinion, that it is

not competent to raise a suggestion of this kind at this Bar, and at this stage of the case. It was open to the Appellants to make any suggestion, to produce any scheme of partition, before the Court in the Island. That scheme could then have been examined upon the spot; evidence could have been produced with regard to it; and, if necessary, a personal inspection by the Judges could and would have taken place. The Appellants appear in the Island to have been satisfied with the scheme which was propounded by the two Experts, and to have rested their case upon that; and so far as we can find upon the record, there is no trace of any application for substituting another scheme, or suggesting a scheme of a different kind, and their Lordships are of opinion, that upon a Code worded as the Code upon this subject is, the only practical way by which any judgment of the Court can be arrived at is by the suggestion by the party who insists upon specific division of some scheme or some mode in which that specific division is to take place; and if, having suggested a particular scheme in the Island, and being worsted upon that scheme, and not having suggested any other scheme as a substitute upon the spot, it were open to that party upon an appeal to their Lordships to simply state that it had not been proved that it was utterly impossible that there might be some other scheme which would be free from the objections which had been thus sustained,—if that were competent for any litigant in the position of the Appellants, it is obvious that interminable appeals might be brought here, the result of which would be simply to sent back the case, again and again, to the Island for further investigation.

Their Lordships are clearly of opinion, that this is not a course competent to be taken; and that the Appellant having failed to shew that the judgment of the Court was erroneous upon those facts and upon that scheme which were before them, and to which their consideration was invited, nothing can now remain for their Lordships to do but humbly to recommend to Her Majesty that this appeal should be dismissed with costs.

Solicitors for the Appellants: *Bothamleys & Freeman.*
Solicitors for the Respondents: *Hill & Son.*

J. C.*
1870
July 7.

THE ATTORNEY-GENERAL OF OUR LADY THE QUEEN FOR THE COLONY OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

ALLAN MACPHERSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Criminal Information—Pleading—Charge of assault—Alleged contempt of Legislative Assembly—Averment of matter in aggravation—Surplusage.

To a criminal information by the Attorney-General of *New South Wales* against a Member of the Legislative Assembly of that Colony, for an assault on a Member committed within the precincts of the House, while the Assembly was sitting, which information averred, that such assault was in contempt of the said Assembly, a general demurrer was allowed by the Supreme Court. On appeal:—*Held*, by the Judicial Committee, reversing such judgment, that the information was good, as the alleged contempt of the Legislative Assembly was charged only as a matter of aggravation, and could be rejected as surplusage, and the information sustainable for an assault.

IN this case a special appeal was allowed from the judgment of the Supreme Court of *New South Wales*, sitting in *Banco*, upon a demurrer to a criminal information filed by the Appellant, the Attorney-General of that Colony, against the Respondent, for an assault on one of the Members of the Legislative Assembly of the Colony, within the precincts of the House, and an alleged contempt of the Assembly.

The information charged "that on the 26th of February, 1868, at *Sydney*, in the Colony, while the Legislative Assembly of the Colony was sitting, *Benjamin Lee*, a Member of the Assembly, whose conduct had been and then was under its consideration, after being heard in his place in the Assembly in reference to such conduct, was, in accordance with the practice of the Assembly, requested by the Speaker thereof to withdraw therefrom; and that *Benjamin Lee*, in obedience to the request, thereupon withdrew from the Assembly into an ante-chamber adjoining thereto,

* *Present*—LORD CAIRNS, SIR WILLIAM ERLE, and SIR JAMES WILLIAM COLVILE.

and that immediately upon his so withdrawing into the ante-chamber *Allan Macpherson*, a Member of the Assembly, in and upon *Benjamin Lee* did make an assault, and him, *Benjamin Lee*, did then beat, wound, and ill-treat, in contempt of the Assembly, in violation of its dignity, and to the great obstruction of its business."

A Bench warrant was issued by the Chief Justice of the Supreme Court of the Colony, and the Respondent was held to bail to appear and plead to this information at the then next sittings of the Supreme Court in its criminal jurisdiction.

The Respondent appeared before the Court at *Darlinghurst*, and being called upon to plead to the information, filed a general demurrer thereto, and a joinder in demurrer was filed by the Attorney-General.

The demurrer was argued before the Supreme Court on the 13th of May, 1868, before Mr. Justice *Cheeke* and Mr. Justice *Faucett;* and on the 18th of the same month they delivered their judgments, Mr. Justice *Cheeke* deciding in favour of the Respondent that the demurrer was good; and Mr. Justice *Faucett* holding in favour of the Crown that the information was good, and that the demurrer ought to be overruled. After some discussion, on the application of the Respondent that the judgment of the Court should be held to be in his favour, the Respondent was informed by Mr. Justice *Cheeke* that he must plead, and subsequently Mr. Justice *Cheeke* ordered a plea of not guilty to be entered for the Respondent, and the trial to proceed. The hearing of the case was, however, postponed till the following day, when the Supreme Court directed that the demurrer should be re-argued before the Court sitting in *Banco*.

Accordingly, on the 5th of June, 1868, the demurrer came on to be heard before Sir *Alfred Stephen*, Chief Justice, and the Justices *Hargrave* and *Cheeke*. The Respondent appeared in person in support of the demurrer, and the Appellant in support of the information.

On the 8th of June, 1868, the Supreme Court gave judgment for the Respondent; the Chief Justice holding, that the Appellant was entitled to judgment; but Mr. Justice *Hargrave* and Mr. Justice *Cheeke* held, that the Respondent was entitled to judgment.

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In conformity with the Order of the Judicial Committee (1) the Judges transmitted their reasons for their several judgments. Those of the Chief Justice were as follows:—

"This is an information filed, *ex officio*, by the Attorney-General, charging the Defendant with the commission—under special circumstances of (real or supposed) aggravation—of an assault and battery. It states in substance, by way of prefatory averment, that while the Legislative Assembly of this Colony was sitting, one *Benjamin Lee*, a Member, in obedience to a request from the Speaker, withdrew therefrom into an adjoining ante-chamber, and that immediately on such withdrawal the Defendant, he being also a Member, committed the assault in question on *Benjamin Lee*. The information then proceeds to allege, that the act was in 'contempt of the Assembly, in violation of its dignity, and to the great obstruction of its business.' Here, then, whatever may have been the intention of the draftsman, and whether we regard the prefatory matter or that which follows the statement of the assault (one or both) as material to and incorporated with that statement, or as surplusage and matter wholly irrelevant, is a clear and distinct charge of an indictable offence,—that of an assault and battery, committed by one man upon another, without apparent justification. This charge is couched in apt terms, with its ordinary technical allegation, that the Defendant assaulted, beat, wounded, and ill-treated his adversary. Such an offence is necessarily against the public peace, or, in legal language, against the peace of the Queen. The addition or the omission of those words is confessedly of no moment. Their formal insertion could not affect in any degree the character or legal quality of the assault, and since the passing of the 16 Vict. No. 18, s. 24, their omission (which is in accordance with the usual modern course) is absolutely immaterial. So that the proposition maintained by the Defendant's demurrer, as I understand it, amounts in effect to this: that the assault and battery committed by him, thus charged, is not punishable on this information, because, although essentially against the peace, it is here charged only as having been in contempt of the Legislative Assembly, and a serious obstruction to its

(1) 4 Moore's P. C. Cases, App. p. xxv.

business. In other words, the question raised by him is, whether an assault is the less punishable by law because it not only was a breach of the peace, but also a contempt (whatever those words may mean) of the local Legislature. Or, putting that allegation aside, whether beating a man ceases to be against the peace, or to be an offence cognizable by this Court, because it not merely injured the individual named (as the information clearly implies), but at the same time obstructed the Legislative business of the Country. It may be, that the information was thus framed for the purpose of inducing the Court, if possible, to regard the assault as an offence solely because of that alleged obstruction, or of the supposed contempt and violation of dignity charged. Let us assume this to have been the case, and, for the sake of argument, that the act of beating is not shewn on this information to have been either a contempt, a violation of any one's dignity, or an obstruction of Legislative business. Or, let it be assumed that no such contempt, violation, or obstruction, however adequately charged, is itself an indictable offence. The conclusion appears to me to be the same—that the failure of the second portion of the indictment, from whatever cause, will not affect the validity of the first. It cannot relieve the Defendant, for the charge of assault, existing unmistakably on the record, remains, and the Court, whatever the design of the Pleader, must take cognizance of that charge. The objection, therefore, that no offence against the Assembly has been shewn, or could be punished by indictment if shewn, fails (as it seems to me) to sustain the demurrer. The imputed offence of beating is not answered by shewing that immaterial or idle allegations follow, such as that the individual beaten was a Senator, or that the act of beating was a contempt or obstruction of senatorial business. If, except simply as matter of aggravation, those allegations are wholly immaterial, which they clearly are if they disclose no offence, the Court may, on a well-known principle, reject them. We have next to consider whether the allegations in question are or not in this sense immaterial—in other words, whether a distinct offence cognizable by law is disclosed by them. And if there be, another question may arise—whether the information is or not then bad for duplicity; for, by the rules of pleading, two different offences (if at least both be well

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laid; see *Shepperd* v. *Shepperd*) (1) cannot be included in the same count. I am of opinion, that there is no second offence charged in this information. It imputes to the Defendant an assault; an offence, as already observed, aptly and technically described, and well known to the law. All that precedes and that follows is, in legal effect, matter of aggravation and detail only, shewing the circumstances which accompanied, not those which constitute, the offence. As, therefore, they form no legal ingredient in the charge, their insertion was unnecessary; and for the same reason that they added nothing to the essence of the crime, the words which tend to aggravate its character were superfluous. But this no more vitiates the indictment than the allegation in *The Earl of Thanet's Case* (2) affected the charge of riot there—that the Defendants thereby not only disturbed the public peace, but also committed a contempt of the Court and obstructed the course of justice. In the view which I thus take of the case, it becomes unnecessary to express an opinion on the question raised, whether it is or not an indictable offence contemptuously or by unauthorized means to obstruct the House of Assembly (and if so, equally the Legislative Council) in the performance of its duties. It would be difficult to define such an offence; for what will amount to an obstruction, especially by a Member of the House, cognizable by the Criminal law? There may be things said, as well as acts done, in either Chamber, unsanctioned by any rules of debate and largely obstructive of Legislative business, which nevertheless ought to be inquired into by no other Tribunal. On the other hand, as neither House can punish offenders in any case, I should be sorry to let it be supposed that every obstruction, however gross, by deed or words, to the performance of their high functions, provided only that it amounts neither to riot nor assault nor libel, has, therefore, an absolute immunity from prosecution elsewhere. And if contemptuous expressions or offensive conduct towards a Justice of the Peace while in the discharge of his duty, operating in effect as an obstruction to its due performance, be indictable at law, as this Court held it to be in *Ex parte Cory* (3); and the authorities referred to by Mr. Justice *Wise* in *Ex parte*

(1) 1 C. B. 854.

(2) 27 How. St. Tr. p. 827.

(3) 3 S. C. R. 309.

Carrol (1), it would seem strange to hold that a similar obstruction to the business of the Assembly or Council sitting in the exercise of legislative powers is not equally so punishable. In *Aldridge* v. *Haines* (2), it is distinctly said by Lord *Tenterden* and Mr. Justice *Parke* that abusive words spoken to the Commissioners of a Small Debts Court might be charged as an obstruction to their proceedings. A like observation is made by the latter learned Judge in the Exchequer, as to an abusive Letter sent to a Bankruptcy Commissioner: *Rex* v. *Faulkner* (3). The case of *Rex* v. *How* (4), which is an instance of a prosecution for obstructing a Magistrate by words spoken, appears to me an authority to the same effect. So is the expression of Lord *Denman* in his judgment in *The Duke of Marlborough's Case* (5). In *Rex* v. *Smith* (6) it is held to be an indictable offence at law to obstruct any person in the exercise of powers conferred on him by Statute. And, on that principle, I presume, in *Kielley* v. *Carson* (7), the Privy Council, in their considered judgment, denying the power of a Colonial Legislative body to commit for a contempt, assume, apparently as a matter of course, that 'contemptuous insults and expressions' are punishable by the ordinary Tribunals. If this be not understood as referring to libels only, it will of course include the case supposed—that is to say, of obstruction by insults, or any contemptuous expression, offered or used to the Legislative body. The case of any such obstruction (or of obstructing by some act or acts done) where the offender is himself a Member of the House, it must be admitted presents more difficulty than that of a stranger so offending. And if, as is intimated in *Doyle* v. *Falconer* (8), Legislative bodies have power to expel a Member for misconduct of this kind, there seems little reason for resorting to a Court of Law. But, on the whole, I see no sufficient reason for holding that the obstruction, if punishable in the one case, is not equally so in the other. Be this how it may, I am of opinion that in every indictment or information for the offence, not only must the obstruction be specifically charged as such, but the act, words, or other matter

(1) 1 S. C. R. 311.
(2) 2 B. & Ad. 425.
(3) 2 C. M. & R. 530.
(4) 2 Str. 699.
(5) 5 Q. B. 957.
(6) 2 Doug. 441.
(7) 4 Moore's P. C. Cases, 89.
(8) 4 Moore's P. C. Cases (N. S.) 219.

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meant to be insisted on as constituting it, must (according to the general rule) be stated with reasonable particularity. The Court must be enabled to see, moreover, on the face of the information, that an interruption of the business and duties of the House really was occasioned, directly or indirectly, by the means stated; and that those means were unlawful, in the sense at least of their being unjustifiable in the person using them. As this case now stands, my conclusion is, that the demurrer ought to be overruled; and that the Defendant, unless permitted as an indulgence to plead in denial of the charge, should receive the judgment of this Court for the assault with which he stands charged, the same being confessed by his demurrer, with the matters charged in aggravation of that offence."

Mr. Justice *Hargrave* stated his reasons as follows:—"In my opinion the present information is an experimental attempt to extend our Criminal indictments beyond the law, and, therefore, *Macpherson's* demurrer ought to be allowed. The Attorney-General, with his usual vigorous conciseness, founded his elaborate arguments,—first, upon the Privy Council cases of *Kielley* v. *Carson* (1), and *Doyle* v. *Falconer* (2); secondly, upon the cases of *Burdett* v. *Abbot* (3), before Lord *Ellenborough*, in 1811, and *Ex parte The Duke of Marlborough* (4), before Lord *Denman*, in 1844; and thirdly, upon the case of *Rex* v. *Smith* (5), before Lord *Mansfield*, and the *ex officio* information against *The Earl of Thanet* and others (6), before Lord *Kenyon* in 1799. The Privy Council cases were said by the Attorney-General to establish that it was 'a high misdemeanour, indictable at Common Law, to obstruct Colonial Legislative bodies, by making great noises during the time of their sittings,' 'using any unbecoming gestures,' or adopting any other line of conduct amounting to 'contemptuous insults or interruptions' of business. It was contended that it was the 'clear inference' or necessary implication, arising from the various sentences read from the several judgments of the Privy Council, that such 'contemptuous conduct' as above mentioned was indictable at Common Law. I

(1) 4 Moore's P. C. Cases, 88.
(2) 4 Moore's P. C. Cases (N. S.), 203.
(3) 14 East, 1–163.
(4) 5 Q. B. 956.
(5) 2 Doug. 441.
(6) 27 How. St. Tr. p. 827.

entirely dissent from those inferences, for it is clear to me, first, that the Privy Council judgments referred to do not adjudicate upon any but the precise points then before their Lordships (as is always the character of the decisions of the English Superior Courts), and that there is not one single sentence in any of these judgments directed to laying down the law authoritatively as to any 'indictable or criminal offence' whatever, or as to any 'misdemeanour' whatever; nor can I find in any of those cases that any other equivalent expression of judicial opinion has been used by their Lordships as bearing authoritatively upon the present most important point of Criminal law. Secondly, these Privy Council cases related merely to civil actions of trespass; and I have yet to learn that our Criminal Code is to be gathered piecemeal out of the Law as to civil actions; or to be hunted up out of implications, or even expressions, of individual Judges when sitting in some civil cases, however illustrious the Courts or however learned the Judges. Thirdly, far from discovering any such extensions of our Criminal Law, as contended for in these cases, in favour of our Colonial Legislative bodies, I think that the cases of *Kielley* v. *Carson* (1) and *Doyle* v. *Falconer* (2), and the well-known case of *Fenton* v. *Hampton* (3), in 1858, clearly shew that the modern tendency of the law (as indeed was admitted by the Attorney-General) is rather to negative and prevent any dangerous assumption by Colonial Assemblies of any novel powers whatever, either as against the personal liberty of their own Members, or as against their other fellow-colonists. It seems to me most expressly laid down that these Legislative bodies, although clothed by the Imperial Statute law with deliberative powers very analogous to the powers of the British Parliament, must be satisfied with relying on 'their own good sense' as their primary 'security for order and decency of debate;' and if that good sense be insufficient, then they cannot claim the extraordinary powers of the House of Commons, but must be content with the aid of the ordinary Common Law Tribunals. The second branch of the argument in support of the present information was that *Burdett* v. *Abbot* (4) and *Ex parte The*

(1) 4 Moore's P. C. Cases, 88.
(2) 4 Moore's P. C. Cases (N. S.), 203.
(3) 11 Moore's P. C. Cases, 347.
(4) 14 East, 1–163.

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ATTORNEY-GENERAL OF NEW SOUTH WALES v. MACPHERSON.

Duke of Marlborough (1) were authorities for holding that a Criminal information was maintainable in respect of any contemptuous or disorderly conduct during the sitting of a Colonial Legislative body—both as against the members of that body and as against 'Strangers in the galleries,' provided the conduct complained of amounted to an 'obstruction of its business.' I am of opinion here, also, that the two cases cited establish no such proposition as that contended for. The elaborate judgment of Lord *Ellenborough* in *Burdett* v. *Abbot* (2), extending over twenty-six pages, contains not one word about 'indictable offences' or 'misdemeanours,' but is altogether directed to maintaining the Common Law right of the House of Commons to protect their own inherent privileges, to maintain the necessary authority of the Imperial Parliamentary Officers and Process, and to maintain the constitutional legality of the Speaker's warrant. With regard to this case of *Ex parte The Duke of Marlborough* (1), I need only remark, that Lord *Denman* expressly refused the application by the Duke for a criminal information, on the ground that there was no precedent for that application, although the aggrieved party supported his application by an affidavit and proofs. Neither *Burdett* v. *Abbot* nor *Ex parte The Duke of Marlborough* can, therefore, support this information. In the third branch of the argument for this indictment, the Attorney-General cited *Rex* v. *Smith* (3) and *The Earl of Thanet's Case* (4); but in the former of these cases, *Rex* v. *Smith*, the indictment was for certain specified obstructions of certain engineering works, specifically alleged in the indictment in the very words of the Act of Parliament said to be violated; while here the information is not for obstructing the execution of any particular section of our Constitution Act, or any amendments thereof, but the information is for a Common Law assault, and the obstruction is merely inferentially and collaterally alleged (if at all alleged sufficiently), and is plainly intended to aggravate and give a new colour of illegal intention to the actual offence charged. This aggravation of 'obstructing' is also so mixed up and combined with the accusation of 'contempt' and 'violation of dignity,' independent of the

(1) 5 Q. B. 956.
(2) 14 East, 1-163.
(3) 2 Doug. 441.
(4) 27 How. St. Tr. p. 827.

obstruction, that the Defendant, *Macpherson* (as he well argued), cannot possibly ascertain the real charge; and a Judge trying the case would find it still more impossible to direct a jury as to the real points for the jurors' consideration, or as to the real offence or offences actually charged. Nor can the *ex officio* indictment in *The Earl of Thanet's Case* (1) support the present information, because although the indictment there was for a Common Law riot, with intent to obstruct 'a lawful proceeding,' yet those proceedings were the regular judicial proceedings of a Court of Justice, of which the Courts of Justice could alone take proper judicial cognizance. This distinction is so obvious, that it is quite unnecessary to make any further observations on *Lord Thanet's Case*, except to remark, first, that the present Criminal Law is scarcely to be gathered from a single *ex officio* indictment of that period; and, secondly, that *The Earl of Thanet's Case* has never been followed since. The case itself is now chiefly known to the legal profession as the case in which the conviction of the Prisoners was obtained by Lord *Kenyon* having compelled a witness to state his own belief and opinion as to the wishes and intentions of the Prisoners under trial, a decision utterly contrary to law now. Having thus disposed of the cases cited in support of this information, I will now shortly state my own objections. My first objection is, that there is no trace either in *Coke*, *Hale*, or any other of the Oracles of the Common Law, of any information in the slightest degree analogous to this, either in its terms, form, or substance. My second objection is, that the Statute Law, as was clearly pointed out by Mr. Justice *Cheeke*, at the trial at *Darlinghurst*, obviously has always been, and is still, the only legal mode of extending the law of assaults. My third objection is founded on the celebrated judgment of Lord *Denman*, in *Stockdale* v. *Hansard* (2), which in this most important branch of our constitutional law has fixed the mutual relations of all Legislative and judicial functionaries; and I am not prepared in any way to assist in breaking down the present barriers between Colonial Houses of Legislature and our own judicial duties on this Bench. I am not prepared, I say, to claim the slightest judicial right, nor, indeed, capability, of judicially deciding or knowing what is the 'dignity' of our Legislative bodies, what is a violation of that

(1) 27 How. St. Tr. p. 827. (2) 9 Ad. & E. 1, 107.

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'dignity,' nor what is a contempt of that body, especially in the face of the Privy Council deciding that there is no such legal entity as a contempt of such bodies; nor what is 'the business' of such Assembly; nor what is an 'obstruction' of such business; although I do most fully admit the proper sense of all those expressions outside the words of a Criminal information. I might point out several other objections to this information, both substantial and technical, but I think I have said enough to shew that this demurrer ought to be allowed. With reference to treating these words as surplusage, it is thus laid down at page 338 of *Hawkins*, P. C. vol. ii.:—'that the Prosecutor, vitiates the indictment, because it judicially appears to the Court, that there is no such foundation for prosecution, as that whereon it is expressly grounded.' I have only further to add, that the remarks I have made upon the authorities cited, and the reasons I have now given for my own judgment, shew that Mr. *Macpherson* would, in my opinion, be equally entitled to the judgment of the Court if he were now moving in arrest of judgment after verdict."

Mr. Justice *Cheeke*:—"After the most attentive consideration of the very able and lucid argument of the Attorney-General, I still retain the same opinion expressed by me at the late sittings of the Criminal Court at *Darlinghurst*, in respect of this information and demurrer. My chief reasons then and now for allowing this demurrer are, first, that the crime of assault is a Common Law offence; secondly, the extensions of the law of assault are only by statutory enactments. To instance this latter point by reference to the many Statutes passed, and as early as *Edward* II., it will appear, that in the reign of 9 Edw. 2, c. 3, and subsequently by 9 Geo. 4, c. 31, s. 23, assaults on Clergymen were made punishable by Statute. 33 Hen. 8, c. 12, assaults in King's Palaces were likewise made punishable. 5 & 6 Edw. 6, c. 4, assaults in Churchyards. 7 & 8 Geo. 4, c. 29, s. 29, assaults on Deerkeepers. The like, c. 53, assaults on Revenue Officers. 9 Geo. 4, c. 31, ss. 24, 25, 26, 27, 29, assaults on Officers, Justices of the Peace, &c., with reference to wrecks, and in pursuance of conspiracies to raise wages, &c. 7 Will. 4 & 1 Vict. c. 85, ss. 3, 4, and c. 87, assaults with felonious intent. 14 & 15 Vict. c. 11, s. 1, assaults by Masters on Apprentices. 16 & 17 Vict. c. 107, s. 249, assaults on Officers

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of Customs. 17 & 18 Vict. c. 104, s. 206, assaults by Masters of ships on Seamen. Thus shewing to demonstration that only by statutory enactments the offence of assault is extended. In reference to the judgment of the Privy Council in the recent case of *Doyle* v. *Falconer* (1), not only does the judgment of the Court limit the law of Colonial Assemblies to the ordinary Tribunals, but Lord *Ellenborough*, in *Burdett* v. *Abbot* (2), after reviewing all the authorities, thus expresses himself: 'the House of Commons can only proceed for contempt by immediate process issuing from itself, or must await the comparatively tardy result of a prosecution in the ordinary course of law.' The words, therefore, in the information: 'In contempt of the Legislative Assembly, in violation of its dignity, and to the great obstruction of its business,' being, in my opinion, matter of substance intending to give a legal character to the entire information, not sanctioned by the Common Law or any statutory enactment, I consider the Defendant is entitled to judgment on this demurrer."

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The majority of the Judges being in favour of the demurrer, judgment was entered for the Defendant, and there being no appeal from such judgment to Her Majesty in Council, the Attorney-General of *New South Wales* presented a petition for special leave to appeal therefrom, which their Lordships recommended, the ordinary security for costs being dispensed with.

As the Respondent did not appear the appeal was heard *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *A. Cohen*, for the Appellant:—

We submit, that the judgment of the Chief Justice was right in law; and that the other Judges who constituted the majority of the Court were in error in holding that the information was bad for surplusage. The information sufficiently charged a common assault. If so, the words imputing a contempt of the Legislative Assembly of *New South Wales*, and violation of its dignity, and the obstruction of its business, form no part of the charge, and, therefore, may be rejected as surplusage, as they do not render the information bad. A

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, LORD JUSTICE WOOD, and LORD JUSTICE SELWYN.

(1) 4 Moore's P. C. Cases (N. S.) 203.

(2) 14 East, 138.

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similarly framed count was used in *The Earl of Thanet's Case* (1), which was the case of a criminal information for riot and other misdemeanours. A mere unnecessary statement of the motive which induced the Defendant to do the act charged against him is treated as surplusage. The rule as to matter of aggravation in Criminal pleadings is thus stated in *Taylor* on Evidence, § 214, p. 245 [4th Ed.] "the law which rejects surplusage applies equally to Criminal as to Civil proceedings;" and he refers to the observations of Mr. Justice *Coleridge*, in *Shearm* v. *Burnard* (2), that "the distinction is between an averment, the whole of which cannot be got rid of without injury to the plea, and an averment of circumstances essential to the defence which are stated with needless particularity. In the latter case, in Civil or Criminal proceedings, the whole may be considered as struck out, and, therefore, need not be proved." Again, in § 215, p. 247, he says: "A second rule respecting variances is, that cumulative allegations, or such as merely operate in aggravation, are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence, specified on the record," referring to *Rex* v. *Hunt* (3). There it was held by Lord *Ellenborough*, that the Defendant may be found guilty upon a count in an information which charges him with having conspired and published a libel, if he is proved to have published without having composed it. The reasons of the Chief Justice of the Supreme Court are conclusive. If the facts charged in the information amounted to an obstructive interruption of the business of the House of Assembly, such obstruction or interruption is a Misdemeanour punishable by the Common Law, and the Appellant could be proceeded against for a distinct offence, which really formed no part of the common assault; the allegations regarding such contempt may, therefore, be rejected as surplusage upon all the authorities, and the information, if it contains such averments, is not demurrable on that ground.

LORD CAIRNS:—

In this case their Lordships are of opinion, that the appeal ought to be allowed, that the judgment which has been entered in the

(1) 27 How. St.Tr. p. 827. (2) 10 Ad. & E. 593, 596. (3) 2 Camp. 583.

Colony for the Defendants should be reversed, and that the demurrer of the Defendant should be overruled, and their Lordships will humbly report to Her Majesty to this effect. Beyond that their Lordships do not proceed. They leave it to the Attorney-General to take such steps as he may think fit, if he should desire to take further steps, with reference to the judgment in the Colony.

Their Lordships read the information in this case as an information which states, in fit and apt terms, that an assault was committed by the Defendant upon the person named in the information, viz. *Benjamin Lee*. They read it as alleging, that "the Defendant in and upon the said *Benjamin Lee* did make an assault, and him, the said *Benjamin Lee*, did then beat, wound, and ill-treat," words which, in all respects, are apt words for the purpose of describing a common assault. They find, then, that added to those words there are some further words, viz. "in contempt of the said Assembly, in violation of its dignity, and to the great obstruction of its business." Their Lordships cannot read these words as an allegation of a further or of a separate offence, but simply as the statement of a consequence resulting from that common assault which is described in the earlier words. Whether that consequence did or did not result from the common assault, whether that consequence ought or ought not to be considered as an aggravation of the common assault, is to the mind of their Lordships immaterial. The words do not alter the character, or the allegations with regard to the character, of the offence which is charged. They may be surplusage; but if surplusage, they do not in any way injure or take away from the effect of the earlier averments. Their Lordships are perfectly satisfied with the reasons upon this head which have been given by the Chief Justice in the Colony. They desire to express their concurrence with those reasons; and it is upon those grounds their Lordships have arrived at the conclusion which has been already intimated.

Solicitors for the Appellant: *Oliverson, Peachey, Denby, & Peachey.*

J. C.* 1870 July 25.

HUGO LEVINGER . . . . . Appellant;

AND

OUR SOVEREIGN LADY THE QUEEN . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA (CRIMINAL JURISDICTION).

Victoria Jury Act—Alien Prisoner—Jury de medietate linguæ—Peremptory challenge—Conviction quashed and venire de novo granted.

The *Victoria Juries Act*, No. 272 of 1865, sect. 37, gives a right of peremptory challenge, restricted to the number of twenty, on trial or inquest taken before any Court wherein the Crown is a party. This right is not taken away by the 38th section of the same Act, which, following the 47th section of the Imperial Statute, 6 Geo. 4, c. 50, provides, in the case of aliens, for a jury *de medietate linguæ;* and though the composition of such jury is prescribed by Statute, the incidents of the trial are annexed by the Common Law, and are implied and included therein.

There is no distinction between the alien and denizen portion of a jury *de medietate linguæ* as to the law of peremptory challenge, wherever the case requires it, and the reason of the rule applies. The Common Law regarding juries, in the absence of positive provision to the contrary, is applicable to jurors on a jury *de medietate linguæ.*

An alien Prisoner tried in the Supreme Court in *Victoria*, for Felony, claimed the right of a jury *de medietate*, which was granted. He challenged peremptorily an alien juror. His challenge was demurred to on the part of the Crown, and adjudged bad, and the trial proceeded to conviction and sentence:—*Held* (special leave to appeal having been granted by the Judicial Committee), that he had a right to such peremptory challenge; that the judgment on demurrer denying such right was erroneous, and the verdict and conviction thereon quashed, and a *venire de novo* awarded.

In this case a special appeal was allowed from a judgment of the Supreme Court of *Victoria*, which affirmed a conviction for manslaughter on the trial of the Appellant.

An information, in the nature of an indictment for murder on the high seas, had been exhibited against the Appellant in the Supreme Court at *Melbourne*, in the Colony. Upon the trial of the information, the Appellant prayed for a mixed jury *de medietate linguæ*, on the ground that he was an alien, born at *Pappenheim*,

* *Present*:—Lord Cairns, Sir James William Colvile, and Sir Joseph Napier, Bart.

in the Kingdom of *Bavaria*, and under the allegiance of the King of *Bavaria;* and a mixed jury, whereof half were British subjects, and the other half were aliens, was impanelled to try the Appellant, when the Appellant challenged peremptorily one *Lord*, an alien, and one of such jury; to which challenge the Attorney-General for the Colony, on behalf of the Crown, demurred, on the ground that *Lord*, being an alien, was not liable to be challenged peremptorily, and the Appellant having joined in demurrer, the Supreme Court gave judgment against the Appellant on the demurrer, and adjudged that the challenge was insufficient in law, and that *Lord* was not liable to be challenged peremptorily. The trial then proceeded, and the jury found the Appellant guilty of manslaughter.

At the trial, a point of law other than that arising on the demurrer was reserved for the consideration and determination of the Judges of the Supreme Court, who afterwards affirmed the conviction, and the Appellant was sentenced by the Court to seven years' imprisonment with hard labour.

The Appellant applied for, and on the 6th of June, 1870, obtained, permission of Her Majesty in Council to appeal from the judgment and sentence of the Supreme Court.

Mr. Serjeant *Sleigh*, and Mr. *J. D. Bell*, for the Appellant:—

An alien who is tried in *Victoria* for a Felony by a jury *de medietate linguæ* has identically the same rights as an alien Prisoner tried in *England* by a similar jury. He may peremptorily challenge alien jurors, so that his peremptory challenges do not exceed twenty in number. This right is secured to him by the *Victoria* Act, called the "*Juries Statute* of 1865," No. 272, which is a combination of the Imperial Statutes, 7 & 8 Geo. 4, c. 28, s. 3, and 6 Geo. 4, c. 50. The 37th section of the Colonial Act corresponds with the 3rd section of the Imperial Statute, 7 & 8 Geo. 4, c. 28, and provides, that "every person arraigned for any Treason-felony, or Misdemeanor, shall be admitted to challenge peremptorily to the number of twenty." Section 38 provides, that "on the prayer of any alien informed against for any Felony, the Sheriff shall by command of the Court return for one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is

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had; and, if not, then so many aliens as shall be found in the same town or place, if any; and no such alien juror shall be liable to be challenged for want of freehold, or any other qualification required by this Act; but every such alien may be challenged for any other cause in like manner as if he were qualified by this Act." This last section is identical, and in the very words of the 47th section of the Imperial Statute, 6 Geo. 4, c. 50, which expressly reserves the right of aliens to be tried by a jury *de medietate linguæ*. The words "any other cause," are not sufficient to take away the right of peremptory challenges in the case of a jury *de medietate linguæ*. There is, therefore, in truth, no difference whatever between the Legislative enactments of *England* and of the Colony of *Victoria*, as to the challenging of juries; and the law founded on the first Statute, 28 Edw. 3, c. 13, as regards juries *de medietate*, is in all respects identical. When the right to such a jury was given by Statute, the Common Law right of challenge attached to it, as a necessary incident: *Hawkin's* P. C. vol. iv., p. 400; and could not afterwards be taken away, except by the express words of a Statute. The Imperial as well as the Colonial Statutes have affirmed such right. In *Rex* v. *Giorgetti* (1) the Court recognised the right of peremptory challenge in favour of the Prisoner as to alien jurors. In this case the opinion of the Court below was founded on a previous decision of the Supreme Court in the case of *Reg.* v. *Ah Toon* (2), which we submit was wrongly decided. There it was held, that a Foreigner on trial by a jury *de medietate* has no right of peremptory challenge as regards the foreign panel then returned by the Sheriff. That case arose upon the trial of a Prisoner, a Chinaman, for Felony, and the question of law was reserved under the Criminal Law and Practice Statute of the Colony, No. 233, sect. 389; the Chief Justice *Stawell*, in giving judgment, observed, "The right to a jury *de medietate* is the creature of Statute, and the enactments of the Imperial Parliament having been repealed, so far as they are applicable to the Country, the law on the subject is now contained in the '*Juries Statute*,' 1865, No. 272. The general powers of section 37 do not extend to this case—the terms of the section do not fit the circum-

(1) 4 F. & F. 546.

(2) 3 Wyatt, Webb, & A'Beckett's Vict. Law Rep. p. 31.

stances. The whole right of challenge as to alien jurymen is found in section 38. There is no right of peremptory challenge," the Chief Justice says, "given in that section, only a right to challenge for 'any other cause' besides 'want of freehold qualification,' and for such cause, but only for such cause, 'in like manner as if he were qualified by this Act.' We think there is only a right to challenge for cause aliens summoned to form a jury *de medietate linguæ*." The conviction was, therefore, affirmed, and the Prisoner was executed. Now, we maintain, that this is an entirely erroneous view of the Statute. The words "any other cause," in the 38th section, are not sufficient to take away the right of peremptory challenge in the case of a jury *de medietate linguæ*. The word "cause" there used includes mere motive. When cause certain is meant in the Statute, it is expressly stated, as in section 36, which enacts, "that in all inquests to be taken before any Court wherein the Queen is a party, howsoever it be, notwithstanding it be alleged by them that sue for the Queen that the jurors of those inquests, or some of them, be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause; but if they that sue for the Queen will challenge any of those jurors, they shall assign for their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court, and it shall be proceeded to the taking of the same inquisition as it shall be found if the challenges be true or not, after the discretion of the Court." This clause is taken from, and is in almost the very words of, the Imperial Statute, 6 Geo. 4, c. 60, s. 29, which limits, as in the 37th section of the Colonial Act, the number of peremptory challenges to twenty; but makes no other restriction. Now, it is a principle of the English law that Prisoners shall be entitled to challenge from mere caprice. It is laid down by *Blackstone* (Comm. vol. iv., p. 353), with reference to peremptory challenge, "the law wills not" that a Prisoner "should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike," and he gives the reason for such a rule. *Rex* v. *Giorgetti* (1) decided that the right of peremptory challenge existed in favour of the Prisoner as to alien jurors. We say, therefore,

(1) 4 F. & F. 546.

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that the verdict delivered on the trial of the Appellant was not the verdict of a jury duly constituted according to law, and the demurrer ought not to have been deemed insufficient in law.

Mr. *Archibald* (The *Attorney-General* (Sir *R. P. Collier*), and The *Solicitor-General* (Sir *John D. Coleridge*) with him), for the Crown:—

There was no error on the record. The judgment given against the Appellant on the demurrer to the challenge was right. In order to construe the Colonial Statute we must see what was the original state of the law. There never was any Common Law right of peremptory challenge as to alien jurors on a jury *de medietate linguæ*. The right of such challenge, if it exist, must be given by Statute, and by the 36th section of the *Victoria* Statute, No. 272 of 1865, it is expressly limited for cause certain. In *England* the right to such a jury was first given to the subject by 28 Edw. 3, c. 13. By the Common Law the King might challenge peremptorily, but by the Statute, 33 Edw. 1, stat. 4, the King must shew cause: *Rex* v. *Stone* (1); Co. Lit. 156. b, 158. b; Bac. Abr. tit. "Juries" (E), 10, 11. Juries *de medietate* were, from their first establishment, under the Statute of 28 Edw. 3, c. 13, on a different footing from ordinary juries. Denizen jurors were required to be Freeholders, but aliens could not at that time hold lands. The 2nd section of that Statute expressly required, as to the half of the denizen jury, that they should not be "suspicious to the one party nor to the other party," and by omitting that requirement as to aliens, indicated the intention of the Statute, that they should not be subject to peremptory challenge. The *Victoria* Statute must be taken to give no other right of challenge than such as is there expressly given. The word "cause" in that Act, as in the English Act, 6 Geo. 4, c. 56, s. 47, means "cause certain." The right claimed by the Appellant requires to have been expressly given by Statute; it is, in fact, not only not given, but excluded. If a Prisoner has the right claimed, the Crown must have a similar right, and if the Crown has no such right, the Prisoner can have none; for the Crown's right of peremptory challenge has only been subjected to the necessity of assigning cause if the trial would otherwise

(1) 6 Term R. 531.

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be abortive, and is otherwise good: *per Campbell*, C.J., in *Mansell* v. *Reg.* (1), commenting on the 33 Edw. 1, stat. 4. and the 6 Geo. 4, c. 50, s. 29, which is in substance the same as the 37th section of the *Victoria* Statute, No. 272 of 1865; *Rex* v. *O'Coigley* (2). The case in the Supreme Court of *Reg.* v. *Ah Toon* (3) was rightly decided. According to the true construction of the Colonial Statute, 28 Vict. No. 272, ss. 37, 38, all right to challenge an alien juror peremptorily is negatived.

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Their Lordships, without calling for a reply, delivered judgment by

SIR JOSEPH NAPIER:—

In this case the Appellant was arraigned at *Melbourne*, in the Supreme Court of the Colony of *Victoria*, upon an information for murder, to which he pleaded not guilty, and put himself upon the Country. He then suggested and set forth that he was an alien, and prayed the Queen's writ for having a jury *de medietate* summoned for his trial on the information. This was granted, and a jury was returned and impanelled accordingly. The single question raised on this appeal is, whether the Appellant was entitled to challenge peremptorily one of the jurors who was an alien.

The rule of the Common Law, as it has been modified by the 37th section of the *Victoria* Statute, provides that every person arraigned for any Treason-felony or Misdemeanour shall be admitted to challenge peremptorily to the number of twenty jurors (*Juries Statute*, 1865, No. 272.)

The right of peremptory challenge at Common Law, was a principal incident of the trial of Felony. When Sir *E. Coke* comments upon the 33 Hen. 8, c. 23, which for a time took away the right of peremptory challenge in cases of High Treason, he says, "the end of challenge is to have an indifferent trial, and which is required by law, and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial" (3 Inst. 27). In *Mansell* v. *Reg.* (4), Lord *Campbell*, C.J., observes that "unless this power were given under certain restric-

(1) 8 E. & B. 70.
(2) 26 St. Tr. 1191.
(3) 3 Wyatt, Webb, & A'Beckett's Vict. Law Rep. p. 31.
(4) 8 E. & B. 71.

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tions to both sides, it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness."

The *Victoria* Statute provides, in section 36, "that in all inquests to be taken before any Court wherein the Queen is a party, howsoever it be, notwithstanding it be alleged by them that sue for the Queen that the jurors of those inquests or some of them be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause; but if they that sue for the Queen will challenge any of those jurors, they shall assign for their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court, and it shall be proceeded to the taking of the same inquisitions as it shall be found if the challenges be true or not, after the discretion of the Court."

The right of the Crown, thus restricted, may be considered as in effect equivalent to a peremptory challenge if, without having to resort to such of the jurors as have been "set by" for the time on the part of the Crown, there can be procured, from those returned on the panel, enough of persons not objected to, to make a jury. The restriction in practice imposed on the Crown is, that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury, such as the party arraigned is entitled to have upon his trial.

The right of this party to challenge peremptorily (but restricted to the number of twenty) is preserved under the 37th section in all cases of arraignment for any Treason or Felony, and it has been extended by this section to cases of Misdemeanor.

It has been contended on the part of the Crown that this right of peremptory challenge, thus secured, was taken away in part by the Appellant having obtained the benefit of the 38th section, by which he was enabled, when arraigned for the Felony, to claim a trial by a jury *de medietate*. The early Statute which conferred this privilege on aliens in cases at the suit of the King, was the 28 Edw. 3, c. 13, s. 2, enacted For the benefit and in favour of Aliens. The words of the enactment are in the affirmative, pro-

fessing to confer a privilege, not to take away a right confessedly material to secure an indifferent Trial, which is required by law.

Under the 37th section of the *Victoria* Statute the right of peremptory challenge on the part of the Prisoner on his arraignment is certain; but it is not equally certain that this right was taken away in part by the necessary operation of the 38th section; or that the rule of the Common Law, as to peremptory challenge, was interfered with in any such case by the necessary operation of 28 Edw. 3, c. 13. In a case where the question arose as to the taking away by implication the right of peremptory challenge in Felony, *Gray* v. *Reg.* (1), *Tindal*, C.J., said, "If the question, whether his right to the peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me that in accordance with the general principle of decision applied to criminal cases, '*tutiùs erratur in mitiori sensu*,' the decision of such question is to be given in favour of the Prisoner, who is not to be deprived, by implication of a right of so much importance to him, given by the Common Law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the Statute." An example of the like construction is to be found in Hawk. P. C. Bk. 1, ch. 7, s. 9 (Felony and Misprision of Felony) where it is said, "If a Statute create a Felony, and says that the offender shall suffer death, yet he shall in such case have the benefit of Clergy, for this, being a privilege allowed by the Common Law, cannot be taken away without express words."

The composition of a jury *de medietate* is prescribed by the Statute, but the incidents of the trial are annexed by the Common Law, and are therefore implied and included in the Statute. If on a *venire* of half denizens and half aliens, the Sheriff returns twelve as aliens, and among them some who in truth are not such, the party may challenge the array for want of a sufficient number of aliens: Hawk. P. C. Bk. 2, ch. 43, s. 43. There is no express provision in the Statute for this, but it is not excluded, and that is enough: 2 H. H., P. C. 321, 379. The right and the privilege are consistent and stand well together. Not only is there no inconsistency in retaining the right of peremptory challenge in a case like the present, and claiming the privilege of having a trial

(1) 11 Cl. & F. 480.

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by a jury *de medietate*, but there are sufficient reasons for making use of both.

In addition to what has been observed by Lord *Campbell*, C.J., as to peremptory challenge, and which applies to all jurors impanelled on a trial for Felony, there may be aliens with national prejudices and hostile feelings against the Prisoner; and objections which he could not make out by legal evidence. There is not a reason assigned in Books of authority in favour of the right of peremptory challenge that is not, at least, as applicable (if not in some instances more so) to an alien as to any of the other jurors. It is to be observed, that by the 38th section an alien juror impanelled on a jury *de medietate* is not liable to be challenged for want of freehold or of any other qualification required by the Act. This is in accordance with the principle of the earlier Statutes (8 Hen. 6, c. 29, and others), by which the laws relating to aliens as to holding property, were not allowed to interfere with the privilege of having a trial by a jury *de medietate*. The 34th section of the *Victoria* Statute makes the want of qualification according to the Act a ground of challenge, and, therefore, it was necessary to remove this hindrance to an alien juror serving on such a jury, under the 38th section. This section places him in the same position as if he had the qualification required by the Act, but leaves him subject to be challenged for any other cause of challenge; that is to say, for any personal disqualification at Common Law, except alienage itself. The Statute being in the affirmative, leaves the Common Law as to these unaffected. This is in accordance with the view of Mr. Justice *Willes* in delivering the opinion of the Judges in *Mulcahy* v. *Reg.* (1).

But for the express saving in favour of the alien juror the disqualifications as to property would have attached, as in the case of a denizen juror. In every instance where the Legislature has not interfered in his favour, it will be found that an alien juror is dealt with as if he were a denizen. The closing words of the 38th section are obviously introduced *ex abundanti cautelâ*, and the words immediately preceding refer to challenges for cause, as distinguished from those that are peremptory.

It was not necessary to draw any distinction between the alien

(1) Law Rep. 3 H. L. 315.

and the denizen moiety of the jury with reference to the law of peremptory challenge, the reason for which applied to both; but it was necessary to distinguish with reference to challenges for cause—for want of property qualification—and to make special provision as to these for the case of alien jurors on a jury *de medietate*. The words of the section relate to challenges for cause only, and are in the affirmative; so that the right of peremptory challenge is not in any way prejudiced.

Whenever the case requires it, and the reason of the rule applies, the law of juries, in the absence of a positive provision to the contrary, is applicable to jurors on a jury *de medietate*. The instance of a challenge to the array has been mentioned. There is another instance in the extension of the law as to a *tales*, where although the words in the Statute were appropriate to the common trials of English, yet the law was extended to a jury *de medietate*. The case of *Julius Cæsar* v. *Curtine* is reported in *Popham* (1), and is fully set out in *Alfrid Denbawd's Case* (2). No case has been cited before the decision of the Supreme Court in 1866, and no text-book of authority has been referred to in which the distinction contended for between the alien and the denizen portion of the jury *de medietate*, as to the law of peremptory challenge, has been suggested. The case of *Reg.* v. *Giorgetti* (3) seems to have proceeded on the principle that an alien juror impanelled was subject to peremptory challenge. As to the exercise of the right of the Crown, under the special circumstances of that case, it seems to have been reasonably restricted so as not to prejudice or abridge the right of the Prisoner to have a jury *de medietate* to try him, so far, at least, as it was practicable to obtain such a jury.

The result is, that their Lordships are of opinion, that the challenge put forward by the Appellant in this case ought to have been allowed. That neither in the provision for the composition of the jury *de medietate*, nor in that for relieving the alien jurors from liability to be challenged for want of a qualification under the Act, nor in that for preserving the liability for other causes of challenge existing at Common Law, is there to be found anything that takes away, or is inconsistent with, the right of peremptory

(1) Poph. 35-6. (2) Co. Rep. pt. 10, p. 104.
(3) 4 F. & F. 546.

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challenge given by the Common Law and preserved by the Statute as a principal incident of the trial of the Felony, and consequent upon arraignment. Their Lordships, therefore, will humbly advise Her Majesty that the appeal should be allowed, that the verdict and conviction should be quashed, and a *venire de novo* awarded.

Solicitor for the Appellant: *H. A. Graham.*
For the Crown: *The Solicitors to the Treasury.*

J. C.* 1870 June 17.

In re SAXBY'S PATENT.

Letters Patent—Application for extension of term—Practice—Accounts—Profits—Patentee Manufacturer of patent article.

In an application for the prolongation of a Patent it is not the practice of the Judicial Committee to decide upon the novelty or utility of the Patent, except so far as such utility may properly be described as merit of that high degree that, every other requisite being satisfactory, it would entitle the Patentee to a prolongation.

A Patentee in seeking a prolongation of the term of the Patent must satisfy the Judicial Committee by the accounts, in a manner which admits of no controversy, of what has been the amount of remuneration which, in every point of view, the invention has brought him, and it is the duty of the Applicant to frame his accounts in such a shape as to leave no doubt as to what the remuneration has been that he has received.

Where a Patentee is also the Manufacturer, the profits which he makes as Manufacturer, although not strictly profits of the Patent, must yet be taken into consideration in estimating the amount of his remuneration.

Therefore, where, on a petition for prolongation, it appeared that the Patentee was at the same time the Manufacturer of the patented article, and was himself necessarily engaged in fixing and putting up the patented apparatus; and that the accounts for such services were so intermixed as to render it impossible on their face to separate the items of profit received from the Patent, it appearing that, on the whole, the receipts had been very large, and that even on the balance alleged there had been considerable gain to the Patentee, the Judicial Committee held that such accounts were unsatisfactory, and refused the application, but without costs.

THIS was an application by *Saxby*, the Patentee, and *Farmer*, his Partner, for the prolongation of a Patent granted for "a mode of working simultaneously the points and signals of Railways at

* *Present*—LORD CAIRNS, SIR WILLIAM ERLE, and SIR JAMES WILLIAM COLVILE.

junctions to prevent accidents." The Letters Patent bore date the 24th of June, 1856. The petition stated in the usual form the nature and merits of the invention, and the various steps taken by the Patentee to bring it into general use, and derive from it a fair remuneration. It appeared that he had entered into various arrangements with parties as Partners and Licensees, and had ultimately joined in partnership with his co-petitioner *Farmer*, and had manufactured for and supplied nearly all the principal lines of Railway in the Kingdom with his very serviceable apparatus. There was no specific statement in the petition of loss or gain on the Patent, but only the usual allegation of want of sufficient remuneration to be drawn from the general statement of the dealings. It appeared, however, from the accounts furnished by the Petitioners, that the sums received for the making as well as fixing the apparatus supplied by the Patentee were very considerable, shewing an amount of receipts and expenditure of upwards of £100,000, and stating an admitted balance of £18,000 and upwards as received as Manufacturers' profits and for royalties ; but leaving, as it was alleged, a net profit only of £14,322. 8*s.* 1*d.* It appeared also, from the manner in which the accounts were made out, that various sums charged as expenditure included allowances claimed in respect of the machinery and plant used in the Manufacture of the patented article, which machinery was used by the Petitioners for other purposes, and it appeared also, that the amounts set down as law expenses included expenses incurred for other Patents than the one sought to be prolonged.

Caveats were entered by various Manufacturers, as well as by most of the principal Railway Companies.

Mr. *Grove*, Q.C., Mr. *Aston*, and Mr. *Macrory*, for the Petitioners.

At the conclusion of Mr. *Grove's* opening

LORD CAIRNS

Stated, that their Lordships would desire that in the first instance witnesses should be called to speak to the accounts, and that the examination should be confined to that point.

After the usual formal proofs, witnesses were examined as to the

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accounts, and exceptions were taken to them, and to the sums placed therein as loss against the large amount received by the Patentee and his Partner for the manufacture and fixing of his patented apparatus.

The *Solicitor-General* (Sir *John D. Coleridge*), Sir *R. Palmer*, Q.C., Mr. *Webster*, Q.C., Mr. *O'Hara Moore*, Mr. *Goodeve*, Mr. *Webster*, jun., and Mr. *Fry*, appeared for the several Opponents.

Mr. *Archibald*, for the Crown,

Objected both to the form and substance of the accounts on the ground, that besides being too general, they shewed upon their face large and very sufficient profits received in respect of the Patent.

The decision of their Lordships was pronounced by

LORD CAIRNS:—

Their Lordships do not propose in this case to go into any question with reference to the novelty or utility of this invention. In point of fact, it is not the practice of this Tribunal to decide upon the novelty or utility of a Patent; and although they would of course abstain in any case from prolonging a Patent which was manifestly bad, yet, in one point of view, they are in the habit, in taking into account that which may be termed the question of utility, to consider not that amount of utility which would be necessary to support a Patent, but that kind of utility which might more properly be described as merit. Upon that question, it is the habit of this Tribunal to consider whether the invention brought before them is one of that high degree of merit which, if everything else were satisfactory, would entitle the Patentee to a prolongation. But in the present case, as I have already stated, their Lordships propose to deal with that which is at the very threshold of the case, the question of accounts.

Now, it is the duty of every Patentee who comes for the prolongation of his Patent, to take upon himself the *onus* of satisfying this Committee in a manner which admits of no controversy, of what has been the amount of remuneration which, in every point of view, the invention has brought to him, in order that their Lordships

may be able to come to a conclusion, whether that remuneration may fairly be considered a sufficient reward for his invention, or not. It is not for this Committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast; it is for the Applicant to bring his accounts before the Committee in a shape which will leave no doubt as to what the remuneration has been that he has received.

Now, their Lordships are by no means prepared to say, that if they had taken these accounts simply as they stand, and had assumed that this was a Patentee who, upon an invention of this kind, had received during the currency of the Patent the sum of £4,519 for royalties, and £14,322 for Manufacturers' profits, if it had rested with those figures merely, that they would have been of opinion, that that alone would have been an insufficient reward for a Patent of this kind. It has been decided, more than once, by this Committee (1) that where a Patentee is also the Manufacturer, the profits which he makes as Manufacturer, although they may not be in a strict point of view profits of the Patent, must undoubtedly be taken into consideration upon a question of this kind. It is obvious, that in different manufactures there will be different degrees of connection between the business of the Applicant as a Manufacturer, and his business or his position as the owner of a Patent. There may be Patents of some kind which have little or no connection with the business of the Manufacturer, and there may be Patents of a different kind, where there is an intimate connection with the business of the Manufacturer; that the possession of the Patent virtually secures to the Patentee his power of commanding orders as a Manufacturer.

Now, it is to be borne in mind, that in this case the two Petitioners, who formerly were Officers of a Railway Company, have embarked in a business as Manufacturers, a business which appears to have risen to considerable magnitude, because we have it in evidence that the gross profits which are represented to

(1) See *In re Betts' Patent*, 1 Moore's P. C. Cases (N.S.) 49; *In re McInnes' Patent*, Law Rep. 2 P. C. 54, 57.

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have accrued from what have been termed the manufacture of locking machines or levers represent something like a quarter of the gross profits of their manufacture, and their Lordships think, that it is impossible upon the evidence before them to do otherwise than to come to the conclusion that that general business of Manufactures of Railway signals, and those things connected therewith, has really been secured to those Applicants by virtue of the possession of this Patent. The description of the work that has to be done upon a Railway would shew to any one that it was an obvious convenience to have it done by the person who supplied, and was answerable for, the proper working of the levers; and, in point of fact, the Petitioner, *Farmer*, himself, mentioned that when he had to consider whether he would or not give a license to Mr. *Mackenzie*, he was guided in his refusing that license by the consideration that he thought his Patent would be seriously prejudiced if Manufacturers other than himself were to supply it to the Railway Companies, when the collateral works might be so imperfectly executed that the invention would get into disrepute. That is an argument that would tell with great force with the Railway Companies themselves, and naturally would lead them to select as the person who was to construct the whole article, those who were the Owners of the Patent, and who were interested in its success. Their Lordships, therefore, consider that they must not only take into account the £4,519 admitted to be received for royalties, but that they must also take into account the admitted Manufacturers' profits of 20 per cent. on these locking machines and levers, and that they must further not overlook the fact, although it is hard to say what pecuniary value should be put upon it, that the general manufacturing business of these Applicants is closely connected with and, as their Lordships think, has been to a great degree produced by their position as Patentees.

But the matter does not stop there, because their Lordships have to express their dissatisfaction at the manner in which these accounts have been made out, and their strong impression that a re-casting of the accounts might lead to a conclusion still more unfavourable to the Patentees.

It appears upon the evidence, that the manner in which the expenditure of these levers has been made out is this: they first take the cost of the materials, and then the wages expended; to those two items a sum of 25 per cent. is added. Then to the sum thus obtained, another 25 per cent. is added: the first 25 per cent. representing what are called Factory charges, depreciation of machinery, and Clerks' wages, and so on; the second 25 per cent. representing the cost of the transport, and fixing the machines. But it is quite obvious, and it is admitted upon the evidence, that these are conjectural charges. They may be quite right. They may not be more than was actually expended under the heads connected with these levers; but, on the other hand, they may be—and in a well-managed trade there is every reason why they ought to be—items which, although conjectural, ought to be so large as to leave a safe margin to make it sure that the Manufacturers, in drawing their subsistence money and dividing their profits from time to time, will err upon the safe side, and not upon the wrong side. But if it be so,—if upon an accurate taking of the accounts, the result of these conjectural charges, and their analysis, should shew that they were larger than what were necessary, it is obvious again that there is a source of profit accruing to the Manufacturer, of which we have no trace whatever in these accounts. We do not say that there was that profit, nor are their Lordships in a position to form an opinion upon it; but it is their duty to say, that it was for those who submitted the accounts to them to put it beyond doubt that there was no further probable source from which profit might have been derived.

Again, when we look at the items in the account in discharge of those sums which are brought to charge, their Lordships find items the explanation of which is anything but satisfactory. We refer particularly to the sum of £819 paid on the settlement with *Hudson*, which appears to have been a subsidiary arrangement between Mr. *Saxby* and the Gentleman with whom he was at the time associated, and may represent anything but expenditure in respect of the Patent. We refer to an item that seems to have been paid in a similar settlement to *Spencer* and *Gossett* of £396. We refer to those large costs of £3,614 paid to *Stevens*, which are

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said to be the result of litigation in respect, not of the Patent of 1856, but of the Patent of 1860, as to which no explanation has been given; and it is difficult to imagine how it came to pass that legal proceedings were taken upon the Patent of 1860 irrespective of the Patent of 1856, and how it was that those proceedings resulted in the granting of the very peculiar kind of license which appears to have been granted to *Stevens*.

Again, there is an item of £100 brought to discharge in respect of the Patent of 1858, under which nothing whatever appears to have been done; and there is a sum of £365 4*s*. 10*d*. for the opposition to *Easterbrook's* application to the Attorney-General for some other Patent, and certain charges as patent Agents for Mr. *Smith*, as to all which the explanation which has been offered is far from satisfactory.

4 PC 91.

Now, these items are items which amount in the whole to a very large sum, to a sum exceeding £5,000. It may be, and it is, perfectly consistent with anything that their Lordships can see, that if those sums were removed from the discharged side of the account the capital side of the account would lose considerably, and the profits arising from this Patent would appear to be very much greater.

Their Lordships have also to observe, that the omission from the accounts and the omission from the evidence of any particulars as to what licenses may have been granted by *Stevens*, and what profits may have resulted from that source, is a defect which has by no means been explained, and which adds another imperfection to the accounts.

It ought, further, to be added that, although it has been said that the Patentee has made out these accounts, in one respect, to his own disadvantage, because he has made no separation between the Patent of 1856 and the Patent of 1860, but has brought to charge all that he has received for putting up these locking machines, although he has applied to them all the newest inventions in the Patent of 1860, their Lordships are of opinion, that it is clear that the Patent of 1860 was simply a supplement and improvement upon the modification of the Patent of 1856. Mr. *Grove* himself said he was not sure whether he should call

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it an improvement or a modification, and that it was the Patent of 1856 which commanded the payment of these items and not the Patent of 1860.

Upon the whole, their Lordships are of opinion, that the Petitioners have failed in their petition, and that the petition ought to be dismissed; but their Lordships consider, that the petition ought to be dismissed without any costs being paid to the Opponents.

Solicitor for the Petitioner: *G. Faithfull.*
Solicitors to the Treasury, for the Crown.

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June 30.

THE NATIONAL BANK OF AUSTRALASIA APPELLANTS;

AND

JOHN CHERRY, EDMUND WILLIAM WRIGHT, AND HENRY PAVY . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA (IN EQUITY).

National Bank of Australasia—Colonial Act for its establishment—Construction of sections 6 and 7—Power of the Bank to hold lands—Deposit of title deeds as security for debt.

By the *Australian Act*, the 22 & 23 Vict. 1859, entitled "An Act to regulate and provide the management of the *South Australian Branch* of the *National Bank of Australasia*, and for other purposes," that Bank is, by sect. 6, constituted a Bank of issue, with all such powers as are usual for establishments carrying on the business of Banking, and by sect. 7 such Bank is empowered to take and hold for reimbursement only, not for profit, freehold and leasehold lands, houses, &c., in satisfaction of any debt due to the Bank, or security for any liability previously incurred, but not in anticipation of such, and to sell and dispose of the same: provided, that it should not be lawful for the Bank to advance or lend money upon the security of lands, houses, &c.

A., who had an account with the Bank in 1861, obtained leave to overdraw to the extent of £10,000 on the security of the deposit of certain title deeds respecting lands; having, however, in 1866, overdrawn to an amount exceeding

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* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), and SIR JOSEPH NAPIER, BART.

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£13,000, the Bank brought an action against him for that amount, and recovered judgment, but agreed not to enforce such judgment, in consideration that the title deeds so deposited were to remain as security for the money then due, for which judgment was, after the approaching harvest, to be signed, and the land sold for the liquidation of such debt. Judgment was accordingly signed; but before the lands were sold *A.* was declared Insolvent, and the Bank, under the provisions of the *Colonial Insolvent Act* of 1860, required the Assignees to whom the title deeds were delivered to sell the lands, which they accordingly did, and paid the proceeds of the sale into Court. To a Bill filed by the Bank against the Assignees, claiming the benefit of these securities, and for the proceeds of the sale, the Assignees put in a general demurrer on the ground, that the title deeds were deposited for future advances to be made by the Bank, contrary to the provisions of the Act, 22 & 23 Vict., 1859. The demurrer was allowed by the Supreme Court in *South Australia*:—*Held*, on appeal, by the Judicial Committee, that there being in 1866 a valid subsisting debt between the Bank and *A.*, the agreement then made was within the enabling part of the 7th section of the Act, and the demurrer overruled.

THIS was an appeal from a decree of the Supreme Court of *South Australia*, affirming a decree of the Primary Judge of that Court, by which the Respondent's demurrer to a Bill filed by the Appellants to enforce their security for advances made by them as Bankers was allowed.

The subject of dispute was a sum of £10,596, being the net proceeds of certain real estate which was sold by the Respondents, the Assignees in insolvency of one *White*, at the request of the Appellants. That sum had been paid into Court to the credit of the cause. The title deeds of the real estate were deposited by *White* before his insolvency with the Appellants, who were his Bankers, and the substantial question raised by the demurrer was, whether, under the Australian Legislative Act, 22 & 23 Vict., 1859, by which the Bank was constituted, the security was or was not valid.

The Bill in the suit was brought to enforce the Appellants' securities. It appeared by the Bill, that *White* had before and at the date of the deposit of the security, in July, 1861, an account at the Bank, but it did not appear that his account was overdrawn at that time. In July, 1861, however, he obtained leave from the Bank to overdraw his account to the extent of £10,000 on the security of a deposit of the title deeds before mentioned; and the deposit having been duly made, he was permitted to overdraw,

and to a greater amount than £10,000. In July, 1866, the overdrafts amounted to £13,718. 18*s.* 8*d.*, to recover which the Bank brought an action; but in August, 1866, *White* agreed with the Bank that the Bank should sign judgment in the action, but should take no steps to enforce the judgment or realize the securities until after the then approaching harvest, and in consideration thereof, and of the pre-existing debt, it was agreed, that the deeds should remain as security for payment of the moneys so as aforesaid due to the Bank, and for which they were to sign judgment, and it was agreed, that the lands comprised in the deeds should be sold with all speed for the liquidation of the amount due to the Bank on the account. Judgment was signed and registered accordingly. After this agreement, but before harvest, *White* was declared Insolvent under the *Insolvent Act*, 1860, of *South Australia*, and the Respondent, *Cherry*, was chosen the Official Assignee, the other Respondents being the Creditors' Assignees of his estate. The above debt, with further interest, was due to the Bank at the date of the insolvency. In February, 1867, the Bank, pursuant to an agreement with the Respondents, and proceeding under the 109th section of the *Insolvent Act*, required the Respondents to sell the lands, and by means thereof to pay their debt, and they offered to hand over the deeds for the purpose of the sale. The title deeds were handed over, and the sale was accordingly made, and the net proceeds were represented by the sum in Court. The prayer of the Bill was for a declaration that the Bank was entitled to the benefit of the security, and for an account in respect of the debt, and of the proceeds of sale, and for payment of the debt thereout, and for ancillary relief for the purpose of securing such proceeds, and for general relief.

The Respondents filed a general demurrer to the Bill for want of equity, and in the memorandum of the grounds of demurrer the Respondents insisted, that the title deeds were deposited as a security for future advances by the Appellants, and that it did not appear by the Bill that there was any money owing by *White* to the Appellants at the time of the deposit of title deeds, and that there was no allegation, that the Appellants complied with the requirements of the Insolvent Act when requesting the Respon-

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dents to sell the properties in the Bill mentioned, and that by the Colonial Act, incorporating the Appellants as a Banking Company (1), it was unlawful for the Appellants to take security on lands for any debt or liability incurred in anticipation or expectation of such security or otherwise, except for any debt or liability *bonâ fide* incurred or come under previously, and on the ground, that the agreement was unlawful and prohibited by the Insolvent Act of 1860.

The demurrer was heard before Mr. Justice *Gwynne*, the Primary Judge of the Court, and on the 2nd of March, 1868, by his judgment he held, that the demurrer was good and sufficient, and ordered that the same should be allowed without costs, and ordered that the sum of £10,596, the net proceeds of the sale of the real estate, should be paid into Court to the credit of the cause, and deposited by the Master of the Court at interest in one of Banks in *Adelaide*, subject to the further order of the Court.

The Appellants appealed from such Order or decree, and the

(1) The Bank was constituted and incorporated by the 22 & 23 Vict. 1859, entitled "An Act to regulate and provide for the Management of the *South Australian Branch* of the *National Bank of Australasia*, and for other Purposes." By the 6th section of that Act they are empowered, subject to the restrictions and provisions therein contained, to carry on the business of "a Bank of issue, discount, and deposit, and to make loans of money on cash credit accounts, Promissory notes, Bills of exchange, or Letters of credit, and on other securities of a like nature, or on personal security; and generally to transact all such other business as is, or shall or may be, usual for establishments carrying on Banking in all its branches to do or transact." And by sect. 7 they are authorized (among other things) "to take and hold, but only until the same can be advantageously disposed of, for reimbursement only, and not for profit, any freehold and leasehold lands and hereditaments, and any real estate, and any merchandise and ships which may be taken by the said Corporation in satisfaction, liquidation, or discharge of any debt due to the said Corporation, or in security for any debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security, and to sell, dispose of, convey, assign, and assure such lands, hereditaments, real estate, merchandise, and ships, as occasion may require." And all persons competent for the purpose may "grant, alienate, convey, assign, and assure the same accordingly unto and to the use of the Corporation, and to their successors, for the purposes aforesaid." And the same section enacts that: "Provided always, that, save and except as hereinbefore specially authorized, it shall not be lawful for the said Corporation to advance or lend any money upon the security of lands, or houses, or ships."

appeal was heard before the Supreme Court, consisting of the Chief Justice (Mr. *R. D. Hanson*), and Mr. Justice *Gwynne*. The third Judge, Mr. Justice *Wearing*, taking no part in the decision, being interested in the matter in dispute in the suit. Upon the appeal, Mr. Justice *Gwynne* differed in opinion from the Chief Justice, and gave judgment affirming the decision of the Court below, and dismissing the appeal. The Chief Justice gave judgment for the Appellants, being of opinion that the decree, allowing the demurrer and dismissing the Appellants' Bill, should be reversed. The Judges of the Court of appeal being divided, the judgment of the Primary Judge was affirmed.

The appeal was brought from this decree of affirmance.

Sir *R. Palmer*, Q.C., and Mr. *Everitt*, for the Appellants:—

The question is one entirely of construction of the Colonial Act passed in 1859, "To regulate and provide for the management of the *South Australian Branch* of the *National Bank of Australasia*, and for other Purposes." The Act, though called a private Act, is made a public one by its last section. By the 7th section, the Bank are empowered to take and hold any freehold or leasehold lands and hereditaments, and any real estate, in satisfaction of any debt, or as a security for any debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security: but it is provided that, except as specially authorized, it shall not be lawful for the Bank to advance or lend money on lands. Now, here there was no lending of money on lands, either legally, or in the sense contemplated by the Act. By the arrangement entered into between the Bank and *White*, the Bank acquired, as they were entitled to do, an equitable mortgage or charge upon the lands comprised in the title deeds which were deposited by *White*, as well to secure the amount overdrawn as to cover the balance of the current account. This was a perfectly legitimate transaction, and the arrangement, operating as a new and independent contract, was entirely within the scope and meaning of the Act. In *In re Agra and Masterman's Bank* (1), a Letter of credit was held a contract in Equity for the benefit of the

(1) Law Rep. 2 Ch. 391.

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acceptors of Bills deposited under such Letter. The mere deposit of deeds, though it may have the effect of pledging the land, is in itself nothing more than a security of the same nature as Bills of Exchange and Promissory notes; for it gives the Depositee no rights as against the land itself, but only against the Depositor personally. And, though a Court of Equity will enforce these rights it will be by a sale, and not by decreeing possession of the lands, to which the Depositee could not acquire any estate. In *Ex parte Kensington* (1) the deposit of title deeds, which constituted an equitable mortgage, was extended by implication and parol to advances made which were beyond the original purpose for which they were deposited. That case has been followed by *James* v. *Rice* (2), which is an authority to shew, that if the deposit of the deeds constituted a new agreement, as we contend it clearly did here, there was no infraction of the Colonial Act. It was competent for the Bank to acquire, as it, in fact, did, a lien on the title deeds so deposited with them, and a charge, therefore, upon the lands comprised therein.

Sir *R. Baggallay*, Q.C., and Mr. *F. Waller*, for the Respondents:—

By the true construction of the Act of 1859, the *National Bank of Australasia*, incorporated by that Act, is prohibited from lending money upon mortgage of real estate or pledge, in the ordinary sense of those words. The title deeds deposited by *White* were deposited as a security for future advances to be made by the Bank to him, as well as security for any existing debt due from him to the Bank. There was no existing debt at the time of the deposit, therefore, the deposit was entirely for future advances, and by force of such the Bank became equitable Mortgagees of the lands upon which they agreed, contrary to the terms of the Act, to advance money. That was the ground of the demurrer in the Court below, and upon that ground the demurrer was properly allowed. This agreement of July, 1866, was no new agreement as to the deposit of the deeds. The cases of *Ex parte Kensington* (1) and *James* v. *Rice* (2) do not apply. They were cases where the Usury laws were invoked on the assumption of an agreement for illegal

(1) 2 Ves. & B. 79. (2) 5 De G. M. & G. 461; 1 Kay, 231.

interest, by means of the deposit of deeds and securities. The case here is one expressly provided for by the Act of 1859, and contrary to its spirit and provisions.

LORD CAIRNS:—

In this case the Primary Judge in Equity in *South Australia*, and afterwards the Court of appeal in that Colony, have allowed a general demurrer to the Bill filed by the Appellants for want of equity; and the question which their Lordships have to decide is, whether the allowance of that demurrer was proper?

The ground of the demurrer was this: the Bill was filed to realize a security of the Bank as equitable Mortgagees. The Defendants to the Bill, who were the Assignees of *White*, the Mortgagor, contended that the mortgage transaction was invalid, and that, therefore, a Bill to realize the mortgage could not be sustained; and the ground of the alleged invalidity was this: a public Act of Parliament of the Colony, incorporating and regulating the Bank in question, which, as the Assignees contended, prevented the Bank making a valid contract for a mortgage under the circumstances described in the present Bill.

The circumstances alleged in the Bill in substance are these:—that *White* was a Customer of the Bank, and that he was allowed a cash credit, and to overdraw his account, upon an agreement to deposit, and upon a deposit, of the title deeds of landed property; that this state of things continued for some years, at the end of which time a large sum, upwards of £10,000, was due from *White* to the Bank; that an action was brought by the Bank against *White* to recover this sum; that this action was proceeding to judgment, and that an agreement was then come to between *White* and the Bank, by virtue of which the Bank were to sign judgment; but it was stipulated that if they would forbear taking proceedings under the judgment, and allow the property of *White* to remain undisturbed for a certain length of time, the title deeds should remain and continue with the Bank as a security for the whole of their demand. That, in a few words, is the result of the more elaborate statements in the Bill.

Now, upon that the Defendants, who were Assignees of *White*, contended that a transaction of this kind was struck at by the

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Act of the Colony of 1859, which is termed in the case which is before us a private Act, but which is made by the last clause a public Act, and to be judicially taken notice of as such, and is intituled "An Act to regulate and provide for the management of the *South Australian Branch* of the *National Bank of Australasia*, and for other purposes." The clause of that Act which is relied upon is the 7th. The previous clauses incorporate the Bank in the usual way, and authorize it to carry on the ordinary business of Bankers, in words which need not be referred to. The 7th clause provides "That it shall be lawful for the Corporation, notwithstanding any Statute or law, and notwithstanding any clause or provision herein contained, to purchase, take, hold, and enjoy to them and their successors in fee simple, or for any estate, term of years, or interest, any houses, &c., necessary or proper for the purpose of managing, conducting, or carrying on the affairs, concerns, or business of the said Corporation." That clause seems to deal with purchases out and out of property for the purposes of offices or premises to carry on the business of the Bank. Then follows this sentence: "And also to take and hold, but only until the same can be advantageously disposed of for reimbursement only, and not for profit, any freehold or leasehold lands and hereditaments, and any real estate, and any merchandise in Ships which may be taken by the said Corporation in satisfaction, liquidation, or discharge of any debt due to the said Corporation, or in security for any debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security." Then there is the further proviso: "Provided always, that save and except as hereinbefore specially authorized, it shall not be lawful for the said Corporation to advance or lend any money on the security of lands or houses or ships, or on pledges of merchandise, nor to own ships."

Now, in the first place, it was contended, that the enactments contained in this clause were not founded upon any considerations of public policy, but were simply regulations for the internal management of the Bank as between itself and its Shareholders, and that they were to be considered as rules merely for the conduct of the Directors, and altogether unaffected by those considerations of public policy which might lead to a wider construction of the Act.

Their Lordships are unable to adopt that argument. They cannot but see in this clause that there was some object on the part of the Legislature to regulate, indeed, the internal management of the affairs of the Bank, but to regulate those affairs not merely, if at all, with reference to the interests of the Shareholders, for it is difficult to see how the interests of the Shareholders could be prejudiced by taking securities of this kind, but rather to regulate those affairs with some regard to the interests of the public who, for some reason or other, which it is not for their Lordships to speculate upon, are, by this Act, supposed to have an interest in confining the Bank to making advances of money without these solid items of security which are specified in this clause.

It appears, therefore, to their Lordships that there are considerations of public policy involved in this clause, but it is also true to say, that those considerations of public policy look to and deal with the management of the Bank, and have for their object the limitation of the powers and authorities of the Bank.

That being so, and without for the present turning to the facts of this particular case, it would seem to have been the object of the Legislature in this clause, not to make void the contracts for such advances as between the Bank and their Customers, in the same way that in former times contracts open to the objections of the Usury laws were made void, but rather to make it something *ultrà vires* the Bank to take, upon the occasion of contracts for those advances, securities of the kind mentioned in this section. And this construction of the section would harmonize with what was very properly, as their Lordships think, admitted at the Bar on behalf of the Respondents—that upon a transaction of the kind described in this Bill, the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the Bank had the power to take the security which it took for the advance.

I may add, that although the words of the proviso which I have read in the latter part of the section would appear somewhat stronger in their negative form than in the affirmative part of the clause, yet, in the opinion of their Lordships, the affirmative part of the clause and the negative part are meant to be correlative and

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co-extensive, and the negative part of the clause is intended to express nothing more than this, that it should not be lawful for the Bank to take landed or mercantile security for advances, except under the conditions mentioned in the affirmative part of the clause.

Now, the conditions appear to be these:—At the time of the advance, and as part of the contract of advance, the Bank was not to be at liberty to stipulate for, or to obtain, landed or mercantile security. That is the construction contended for by the Respondents, and their Lordships, at all events for the purpose of argument, will assume that it is the proper construction. On the other hand, if there should be an advance made, and a debt incurred and due from a Customer to the Bank, the Bank was to be at liberty to take security for that overdue advance either in the shape of land or in the shape of merchandise as described in the Act; and the question is, whether the transactions narrated in this Bill, the statements as to which must be assumed for the purposes of this appeal to be in all respects true, expose the transaction to the prohibition contained in this Colonial Act.

Their Lordships will assume, for this purpose, that in the original inception of this transaction, and in the history of it up to the month of August, 1866, the Bank would have been unable to have enforced the security which was given to them at the time of the first making of the advance to *White*. Their Lordships will assume, that the taking of a deposit on the occasion of that advance would be *ultrà vires* the Bank, in consequence of the enactments of the 7th clause of the Act. But then the advance was made, and that, as I have already said, in the opinion of their Lordships constituted a valid debt as between the Bank and their Customer; that debt in the month of August, 1866, amounted to the sum of £13,718; and this statement is thus made and set forth in the Bill as to what then took place between the Bank and the Customer. "The Plaintiffs commenced an action on the Common Law side of the Court for this sum on or about the 12th of July, 1866, and the said *Samuel White* entered an appearance to the said action; but it was subsequently, on or about the 2nd day of August, 1866, agreed between the said *Samuel White* and the Plaintiffs, that the Plaintiffs should sign judgment in the said

action, and that the Plaintiffs should not take any steps to enforce the said judgment, or to realize the said securities, until after the harvest then ensuing; and in consideration thereof, and of the said pre-existing debt, it was agreed that the said deeds should remain as security for payment of the moneys so as aforesaid due to the said Plaintiffs, and for which they were to sign judgment as aforesaid, and the lands comprised in such deed should be sold with all speed for the liquidation of the amount due to the Plaintiffs on the said account under the joint direction of"—certain persons therein mentioned.

Now, it is to be observed that, supposing the construction of the Act of the Colony to be that which their Lordships have assumed, the position of *White* at this time was this:—He might have said to the Bank, "You may proceed against me and recover your debt; you may sign judgment, and you may take such steps under that judgment as the law allows, but the deposit of my deeds is invalid. It was *ultrà vires* the Bank to obtain such a security. I demur, therefore, to your interfering with my estates, and I require you to deliver up these deeds, which you had no right under your Act to take from me." That, I say, Mr. *White* might have done. He did not think fit to do so, and, on the contrary, for considerations which are tangible and valuable, and which are described in this section, he preferred to make a fresh agreement of a different kind with the Bank, by which he authorized the Bank to retain these deeds, and promised that the deeds should be a security for the sum for which judgment was about to be signed.

Now, it appears to their Lordships that that is a transaction which falls within the enabling part of the 7th section. It is a transaction in which security is taken by the Bank for a debt or liability *bonâ fide* incurred and come under previously, and as such would be warranted by that section.

But then it is said, that the words following those which I have read interfere with this result,—the words, namely, "not in anticipation or expectation of such security;" that is to say, a debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security. But their Lordships are of opinion, that it cannot be said in this case, the security which their Lordships fasten upon being that of August, 1866, that it was

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in anticipation or expectation of that security that the advance was made by the Bank. The advance was originally made by the Bank, if upon any security, clearly upon the security attempted to be created in the year 1861. It is true that that was a security affecting the same property, but the security itself was a different security. That security so effected or professed to be effected in the year 1861, their Lordships have assumed to be invalid; and their Lordships think, that the advance, not having been accompanied by any promise to give any further or other security at a future time, was an advance which cannot be said to have been made in anticipation or expectation of that security which came to be given in the month of August, 1866, as to which, as I have already said, Mr. *White* was entirely free either to give it or to refuse it, as he thought best. He gave it, but he gave it not in fulfilment of any previous promise or anticipation or expectation, but because he found it convenient for himself to give it at that time.

Their Lordships, therefore, are unable to take the view of the Primary Judge in the Colony—that this dealing between the Bank and the Customer at the time to which I have referred, in the month of August, 1866, was in any way struck at or interfered with by the Act of the Colony under which the Bank was formed, and finding that there was a good and valid debt between the Bank and the Customer, their Lordships are of opinion, that the Bank had the right to stipulate for and take the security which they took in the month of August, 1866.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, and the demurrer overruled with costs; in addition to which the Appellants must have the costs of this appeal. If the Respondents desire to answer the Bill, there may be liberty given to apply to the Court in the Colony for time to answer.

Solicitors for the Appellants: *Torr, Janeway, Tagart, & Janeway.*
Solicitors for the Respondent: *Dawson, Bryan, & Dawson.*

RAYNES WAITE SMITH . . . . . APPELLANT;

AND

JANE GEORGIANA O'GRADY, ELIZA ANN SHANNON, BONELLA MARIA MARCHANT, JOHN MARCHANT, AND JOHN CHAMBERS MAHON . . . . . RESPONDENTS.

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July 7.

ON APPEAL FROM THE COURT OF CHANCERY OF JAMAICA.

Jamaica—Real and personal estate—Right of Executor of an Executor to an account of the estate of the original Testator—Laches.

Lapse of time will not of itself bar an Executor of an Executor of his right to have an account of his Executor's Testator's estate taken, with a view to ascertain such Executor's liabilities as an accounting party.

A Testator bequeathed all his real and personal estate in the Island of *Jamaica*, after payment of debts and legacies, to the Respondents, his Grandchildren, to be apportioned when they should attain the age of twenty-one years, and appointed *D. R.* Executor and Guardian. The Testator died in 1832, and *D. R.* entered into possession of the real and personal estate, and carried on the Testator's trade. An account of the Testator's estate was taken by *D. R.* in 1841, but not finally closed. *D. R.* died in 1850, and appointed the Appellant his Executor. The Respondents had all attained the age of twenty-one years in 1865, and in that year the Appellant, who was the Executor of *D. R.*, filed a cause petition under the Island Statute, 15 Vict. c. 16, in the Court of Chancery in *Jamaica*, for an account of the real and personal estate of the original Testator:—*Held*, that the Appellant was entitled, notwithstanding the delay, as a matter of right, to have an account taken of the personal estate of the Testator, and inasmuch as *D. R.* had been appointed Guardian of the infants, and had entered into possession of the real estate, accounts should also be taken of the rents and profits of the real estate of the Testator.

THIS appeal was brought against an Order of the Vice-Chancellor of *Jamaica* dismissing the petition of the Appellant, under the *Court of Chancery Regulation Act* of 1851, 15 Vict. c. 16, to which the Respondents, and also *Bonella Maria Marchant*, *John Marchant*, and *John Chambers Mahon* were made parties as Defendants.

The Appellant was Executor of *Duncan Robertson*, late of *Jamaica*, who was the Executor in that Island of *John Chambers*,

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the Testator in the petition named. The Respondents were the persons who, in the events which had happened, were the only persons entitled to the benefit of the residuary devise and bequest in the Will of the Testator. The petition was filed on the 8th of May, 1865, by the Appellant against the Respondents, stating the facts hereinafter detailed, and alleging that there was a debt due by the estate of *Chambers* to the estate of *Robertson*, amounting to the sum of £1,648. 11*s.* 10*d.*, exclusive of interest; and praying for an administration decree of the real and personal estate of *Chambers*, and for a sale of the real estate, and for payment of debts and costs.

John Chambers, the Testator, by his Will, dated the 30th of September, 1831, after making certain specific bequests and bequeathing pecuniary legacies, devised and bequeathed all the residue and remainder of his estate whatsoever and wheresoever, subject to the payment of such legacies, to his Grandchildren, therein named, of whom the Respondents, except *John Marchant*, were the survivors, and to their respective heirs and assigns for ever, as tenants in common, and to be apportioned to them when they should respectively attain the age of twenty-one years; and the Testator appointed *Duncan Robertson*, *William Adlain*, *Patrick Mahon*, *Edmund Francis Green*, and *Thomas Phillpotts*, Executors of his Will.

The Testator died in 1832, leaving the several Grandchildren named in his Will, all of whom were Minors, him surviving, and his Will, with a Codicil, was proved by *Robertson* and *Mahon*, in the Court of Ordinary in *Jamaica*. The Testator was seised in fee of real estates in *Jamaica*. He was also possessed of considerable personal estate.

Upon the death of the Testator, *Robertson* took possession of both the real and personal estate of the Testator, and carried on the business of a Breeder of Cattle and dealer in stock, the trade the Testator carried on, and during the infancy of the Testator's Grandchildren received the rents and profits of such real estate and business until the year 1840.

In December, 1840, a Guardian of the infant Grandchildren was appointed by the Court of Chancery, who thereupon took possession of the real estate, and retained the same during the infancy

of the Grandchildren and until his death. Since when it had been in their undisturbed possession, or in the possession of the survivors, or their representatives.

It appeared, that on the 17th of August, 1811, the accounts of *Robertson* in relation to the Testator's estate were closed, though not settled, and that no subsequent account had been rendered.

Robertson died in 1850. The Appellant was one of his Executors. In May, 1865, he filed the cause petition in this suit for the administration of the real and personal estate of the original Testator, *Chambers*.

The petition came on for hearing before *Bryan Edwards*, Esq., Vice-Chancellor of the Court of Chancery, in *Jamaica*, and on the 2nd of May, 1868, judgment was given by the Vice-Chancellor, and an Order made whereby the petition was dismissed, on the ground of laches on the part of the Appellant, but without costs.

From this Order the Petitioner appealed to Her Majesty in Council.

Sir *R. Palmer*, Q.C., Mr. *Mackeson*, Q.C., and Mr. *Wellington Cooper*, for the Appellant:—

The Court below misunderstood the right of the Appellant to have an account taken. *Robertson* was the Executor and Trustee under the Will of the Testator, *Chambers*, and there are open and unsettled accounts between their respective estates. The *Statute of Limitations*, 3 & 4 Will. 4, c. 27, therefore, does not apply. Every Executor or Trustee, or representative of an Executor or Trustee, has a right to have the trust accounts taken under the decree of the Court so long as the estate remains, as in this case, unwound up and not fully administered. The parties beneficially entitled under the Will of the Testator, *Chambers*, are entitled to call upon the Appellant, as the Executor of their Testator's Executor and Trustee, for an account, and, therefore, the Appellant, as such Executor, is entitled to discharge his Testator's estate under the decree of the Court. The Appellant had a right to file a Bill for an account, both in respect of the real and personal estate of the original Testator, and he is entitled to have such accounts taken by petition under the *Island Act*, 15 Vict. c. 16, unless there has been laches. There was none here. There is an outstanding account, and a balance

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is still due to *Robertson's* estate. All the Appellant seeks for is the common administration decree. The case on both sides is, that the real estate is in question. *Robertson* was appointed, by the Will, Guardian in respect of the real estate. All the proceedings below have been on the assumption that *Robertson* was in legal possession. The Vice-Chancellor in the Court below, rejected the defence of the Respondents to the effect that the debt claimed by the Appellant was only incurred through the mismanagement by *Robertson* of his Testator's, *Chambers*, estate, on the ground that, as *Robertson* had duly recorded his accounts of *Chambers'* estate, the Respondents could only have had, in a suit of their own, an inquiry to enable them to falsify such accounts. But he decided, that the Appellant and his Testator, *Robertson*, had shewn negligence and delay in not prosecuting the claim earlier; and that the Appellant was not within the equity of the *Statute of Limitations*, and consequently barred by laches. This, we insist, was neither sufficiently proved nor admitted on the pleadings.

Mr. *Shapter*, Q.C., and Mr. *Tripp*, for the Respondents:—

We submit that no case was stated on the petition, or is now shewn, which entitles the Appellant to the relief sought against the Respondents, or to any relief which can affect them personally, or charge the real estate vested in them and the other Devisees. The evidence shews, that not only all the debts of *Chambers*, but all his legacies, were paid out of his assets. The claim, if any, of *Robertson*, or of the Appellant, as representing him, is only for advances or expenditure in respect of the business of a Breeder of and dealer in stock, or otherwise in relation to his possession of the real estate of the Testator, *Chambers*. *Robertson* was not justified in incurring any liability in respect thereof so as to affect or charge the Respondents or their interests in the real estate. The accounts of *Robertson* were closed in 1841, and he never set up any claim in his lifetime. But, if *Robertson* ever had any such claim, the remedy in respect thereof was barred by the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, and by the length of time which has elapsed. This cause petition is not like an ordinary administration suit. The object of the cause petition was to have an account taken of the real estate, and to create a charge on the real estate

in respect of a debt alleged to be due to *Robertson* by *Chambers'* estate. The petition alleges the payment of debts and legacies out of assets. There was no charge created on the real estate by *Chambers*. *Robertson* was not the Guardian of the real estate. A Grandfather cannot appoint a Guardian of infants. *Robertson* was only a Bailiff, having the management of the estate. If a decree be made for an account, what accounts are to be rendered? The accounts settled in 1841, are recorded in the Island Court. In *Sleight* v. *Lawson* (1) it was held, that accounts recorded in the Court of Chancery of *Jamaica* in a suit instituted against Executors who had proved the Testator's Will in that Island, are, in a suit in *England* against them, to be considered *primâ facie* evidence of the truth therein contained. It is too late now to open the accounts: *Curling* v. *Austin* (2).

LORD CAIRNS:—

Their Lordships entirely concur with the learned Judge of the Court below, that this is a suit brought after very great and, perhaps, censurable delay, that if it were a question of indulgence it is entitled to none, and that the rights of the Plaintiff, and the relief to be given to him, ought to be carefully scrutinized, so that that which he is entitled to, and only that, should, under the circumstances of the case, be granted. But having said this, their Lordships are not prepared to assent to the view taken by the learned Judge, that an Executor coming, even after the delay which has taken place in the present case, and asking to have those accounts taken in which he has been the receiving party, is to be deprived of such right, and of having it ascertained, once for all, what his liability as an accounting party is, merely from the lapse of time that has taken place.

So far, therefore, as the personal estate is concerned, and as the position of the Appellant, as Executor, or Executor of an Executor, is concerned, their Lordships think that, notwithstanding the delay, the Appellant is entitled, as a matter of right, to have the account of the personal estate of the Testator taken, and to have it ascertained whether, upon these accounts, he is a Debtor or a Creditor of the estate. Their Lordships think that to be the right

(1) 3 K. & J. 292. (2) 2 Dr. & Sm. 129.

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of the Executor upon the statements made in his own complaint, and not denied; but they think that right is strongly fortified in the present case by the fact, that the residuary Legatees, the persons with whom he is to be in account, themselves admit and assert that his accounts have never been settled; and further, that if they were properly taken a sum would be found due from him to them. So much as regards the personal estate.

As regards the real estate, their Lordships are of opinion, that it being asserted and sworn to on the part of the Appellant that *Robertson*, who was the Executor under the Will, and who appears to have been mentioned as a Guardian of the Infants in respect to the devised property, although a legal Guardian he could not be made by Will; and it being stated, that he had entered into possession of the real estate, and received the rents and profits of it, and this not being controverted by the Defendants, but, on the contrary, being insisted upon by them, and it being stated by them, that he is accountable in respect to those receipts, their Lordships are of opinion, that the accounts should extend to the receipts of rents and profits in respect of the real estate, and to the dealings of *Robertson* in respect to the real estate, for the purpose of ascertaining whether upon that account also any sum is due from or to *Robertson* or the Appellant.

Their Lordships observe, that the petition seeks to raise the question, whether *Robertson*, or the Appellant, is not entitled to a charge upon the real estate in respect of any sum that may, upon one or both of these accounts, be found due to him. Their Lordships do not consider, that they are in a position to decide that question. The Will may have been referred to in the proceedings in the Court below; it has not been formally placed before their Lordships. But, in addition to that, their Lordships consider that that is a question which may be affected by the law of the Island; and they do not find that this point has been taken notice of specifically by the learned Judge from whose decision the appeal proceeds.

Their Lordships will, therefore, humbly recommend to Her Majesty that, in place of the Order dismissing the suit in the Court below, there ought to be an account of the personal estate of the Testator received by *Robertson* or the Appellant, and of their

application thereof, and whether any and what sum is due to or from the Appellant as Executor of *Robertson* in respect thereof, and also an account of the rents and profits of the real estate of the Testator received by *Robertson* or the Appellant, and of their application thereof; and of the dealings of *Robertson* in respect of the real estate, and whether any and what sum is due to or from the Appellant as Executor of *Robertson* in respect thereof. Their Lordships think there should be an inquiry whether any debts or legacies are unpaid, in place of the ordinary general account of debts and legacies, and whether any personal estate is outstanding. They propose, then, to reserve further consideration and costs in the Court below, and in particular the question, whether the Appellant, as Executor of *Robertson,* is entitled to any lien on the real estate in respect of any sum which may be found due in respect of the dealings with the real estate. And their Lordships will order, that the costs of the Appellant and of the Respondents in this appeal should be made costs in the cause in the Court below. Perhaps it is better to mention—it will, indeed, be observed from what I have said—that their Lordships desire the account to be taken in the form which I have stated, and they do not propose that the recorded accounts should be taken as settled accounts in any way between the parties.

By an Order in Council made herein, it was ordered, that in place of the Order dismissing the suit in the Court of Chancery in *Jamaica,* there ought to be an account of the personal estate of the Testator received by *Duncan Robertson,* or the Appellant, and of their application thereof, and whether any, and what sum, is due to or from the Appellant, as Executor of *Robertson,* in respect thereof; and also an account of the rents and profits of the real estate of the Testator received by *Robertson* in respect of the real estate, and whether any, and what sum, is due to or from the Appellant, as Executor of *Robertson,* in respect thereof; and that there should be an inquiry, whether any debts or legacies are unpaid, in place of the ordinary general account of debts and legacies, and whether any personal estate is outstanding, and that the account be taken in the form thus stated; and that the recorded accounts should not be taken as settled accounts in any

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way between the parties: reserving further consideration, and costs in the Court below, and in particular the question whether the Appellant, as Executor of *Robertson*, was entitled to any lien on the real estate in respect of any sum which might be found due in respect of the dealings with the real estate.

Solicitor for the Appellant: *G. S. Airey.*
Solicitors for the Respondents: *Valpy & Chaplin.*

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GEORGE LYALL . . . . . APPELLANT;

AND

JARDINE, MATHESON, & CO., TRADING AT HONG KONG, CHARLES FREDERICK STILL, AND GEORGE FRANCIS MACLEAN, PETITIONING CREDITORS, AND FREDERICK SOWLEY HUFFAM, OFFICIAL ASSIGNEE . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Practice—Ex parte application for special leave to appeal—Appellate jurisdiction — Bankruptcy — Cotemporaneous adjudication — Affirmance — Costs— Separate Respondents.

On a petition for special leave to appeal the petition must fully and truly state all circumstances which possibly can have any bearing on the leave asked for.

Where, on the evidence submitted to the Court below, the Order was properly made, no appeal will lie on the ground that facts existed which would, if known to that Court, have led to a different Order being made, those facts not having been submitted to the Court.

A member of a Firm carrying on business in *London* and *Hong Kong*, sent from *London* a power of attorney to his Partners in *Hong Kong*, enabling them to petition the Court at *Hong Kong* for an adjudication of Bankruptcy; or to make an assignment of all their estate in trust for Creditors. Under this authority they petitioned the Court, which was, by the law of Bankruptcy in force there, in itself an act of Bankruptcy; and they also assigned the property of the firm to a Trustee, which was also an act of Bankruptcy

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* *Present*:—LORD CAIRNS, SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, and SIR LAWRENCE PEEL.

by that law. About the same time a Partner of the Firm resident in *London* was adjudicated Bankrupt there, and a joint adjudication passed in *Hong Kong* against all the Partners, the latter being subsequent in date to the former:— *Held*, that it was not competent to the Partner in *London* to dispute the validity of the joint adjudication.

Semble, a separate adjudication in *England* against the English resident Partner of a *Hong Kong* firm, is no ground for refusing in *Hong Kong* a joint adjudication against all the Partners, though one is not resident in the Colony.

The case of *Carter* v. *Dimmock* (1) explained.

On granting special leave to appeal a sum of £300 was deposited as security for the Respondents' costs. Three sets of Respondents appeared separately. In affirming the decree appealed from it was ordered, that if the taxed costs of the Respondents amounted to a larger sum than one-third of the sum so deposited it was to be divided rateably.

IN this case special leave had been given by the Judicial Committee to the Appellant to appeal from an Order of adjudication in Bankruptcy made by the Supreme Court at *Hong Kong* on the 23rd of May, 1867, by which the Appellant, together with the Respondents, *Charles Frederick Still*, and *George Francis Maclean*, his co-partners in *Hong Kong*, were there adjudicated Bankrupts, pursuant to the provisions of the *Hong Kong* Bankruptcy Ordinance, No. 5 of 1864.

The petition for leave to appeal was presented by the Appellant, on his own behalf, on the 12th of May, 1868, and the leave to appeal granted on the 15th of June in that year.

The petition stated, that in April, 1867, the Appellant was, and for some time previously had been, carrying on the business of a Merchant in co-partnership with the Respondents, *Still* and *Maclean*, at *Victoria*, in the Colony of *Hong Kong*, under the style or firm of *Lyall, Still, & Co.*, and in *Leadenhall Street*, in the City of *London*, under the style or firm of *George Lyall* and *Charles Frederick Still;* that on the 18th of April, 1867, the Appellant was, upon the petition of *John Lyall*, a Creditor of the Appellant in respect of a debt due from him, duly adjudicated Bankrupt in the Court of Bankruptcy in *London*, pursuant to the provisions of the *Bankruptcy Act*, 1861, and having surrendered to such Bankruptcy, on the 14th of February, 1868, passed his last examination thereunder; that on the 23rd of May, 1867, the Respon-

(1) 4 H. L. C. 337.

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dents, *C. F. Still* and *G. F. Maclean*, were, upon the petition of their Creditors, the Respondents, *Jardine, Matheson, & Co.*, of *Hong Kong*, filed on the 21st of May, 1867, adjudicated Bankrupts by the Supreme Court of *Hong Kong;* that *Still* and *Maclean*, being at the date of such adjudication in *Hong Kong*, surrendered thereto, and passed their last examination, and respectively obtained their Orders of discharge thereunder; that the Petitioner was at the time of such adjudication in *Hong Kong*, and from that time had continuously been residing in *England*, and had no notice or knowledge whatever of the petition or adjudication in *Hong Kong* until on or about the 8th of July, 1867, when he received a Letter from *Still* informing him of the fact; that he was unable to shew cause against the validity of the same within the time limited by the provisions of the *Hong Kong* Bankruptcy Ordinance of 1864; that he was still subject to the jurisdiction of the Court of Bankruptcy in *London*, and that he was desirous to obtain leave to appeal to Her Majesty in Council for the purpose of disputing the validity of the adjudication made in *Hong Kong* on the 23rd of May, 1867; and was advised that, unless he commenced some proceedings for that purpose within twelve months after the advertisement of his Bankruptcy in the *Hong Kong Gazette*, he would have no remedy, and that such adjudication would be final against him, and leave him exposed to serious pains and penalties under the provisions of the Bankruptcy Ordinance of 1864; and he prayed leave to appeal from such adjudication of Bankruptcy in *Hong Kong*, and that the Supreme Court might be ordered to transmit the transcript of the proceedings and evidence on such adjudication.

The petition was supported by an affidavit of the Petitioner's Solicitor, which was an echo of the petition; to which was appended a copy of the certificate of the Commissioner of the appointment of the Creditors' and Official Assignees of the Appellant in the *London* Court of Bankruptcy.

The application was heard *ex parte*, and leave to appeal granted by the Judicial Committee on the 15th of June, 1868, from such adjudication of Bankruptcy, with directions to the Registrar of the Supreme Court at *Hong Kong* to transmit copies of the pleadings and record.

The record of the proceedings in Bankruptcy in the Supreme Court in *Hong Kong* having been transmitted, it appeared that, on the 18th of April, 1867, the Respondents, *Still* and *Maclean* themselves, and their co-partner *Lyall* (the Appellant), filed a petition in the Supreme Court stating that they were unable to meet their engagements with their Creditors, and praying to be adjudged Bankrupts; that such petition was presented in pursuance of a power of attorney duly executed by *Lyall*, in *London*, on the 11th of February, 1867, empowering his co-partner, *Still*, to sign or file any declaration or petition in Insolvency or Bankruptcy, and to do and execute all such acts necessary to make him, the Appellant, a Bankrupt, and to liquidate the debts and liabilities of the firm in *Hong Kong*.

It did not appear that any further steps were taken on the above petition, nevertheless, it was alleged, that the filing of such petition was in itself an act of Bankruptcy under the 16th section of the *Hong Kong* Bankruptcy Ordinance of 1864, which enacts, that "if any Debtor petitions for adjudication against himself under that Ordinance, otherwise than in *formâ pauperis*, he shall be deemed to have committed an act of bankruptcy at the time of filing such petition." This petition, with the affidavit in support thereof, formed part of the transcript of the proceedings of the Court.

On the 21st of May, 1867, such of the Respondents as formed the firm of *Jardine, Matheson, & Co.*, petitioned the Supreme Court at *Hong Kong*, as Creditors of the Appellant and his Partners, for an adjudication in Bankruptcy against them, the ground stated in the petition being as follows:—"Your Petitioners have been informed, and verily believe, that the said *George Lyall*, *Charles Frederick Still*, and *George Francis Maclean*, trading as aforesaid, did lately commit an act of Bankruptcy within the true intent and meaning of the Bankruptcy Ordinance, 1864." The act of bankruptcy here alluded to being the filing of the before-mentioned petition of the 18th of April, 1867. The hearing of this latter petition took place on the 23rd of May, 1867, and on that day a deed of conveyance and assignment by *Lyall*, *Still*, and *Maclean*, dated the 29th of the same month, was brought in and registered in the office of the Registrar of Bankruptcy in the Supreme Court, of all

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their estate and effects, real and personal, to *Robert Lyall*, for the benefit of their Creditors, to be applied and administered by him in like manner as if they, *Lyall, Still, & Co.*, had been adjudicated Bankrupts upon an act of Bankruptcy committed at the moment of their execution of those presents. The adjudication was made on the same day, the Bankrupts in *Hong Kong* consenting, and all the Creditors to any amount concurring, to ask such; the Judge stating, that such adjudication was not to be taken as a precedent, but was made under the specialties of the case. The Appellant was on this occasion represented by Counsel, who produced and filed the above-mentioned power of attorney from the Appellant of the 11th of February, 1867. No intimation was, or, indeed, could be, given of the Appellant having been adjudicated a Bankrupt in *London*, or having surrendered and passed his examination thereunder, as stated in his petition for leave to appeal; but *Huffam*, the Official Assignee appointed by the Supreme Court, and who had been admitted a Respondent after the allowance of the Appellant's appeal, alleged and insisted, that such adjudication in *England* was an act of Bankruptcy within the meaning of section 12 of the *Hong Kong* Ordinance of 1864, which he there set out.

The appeal now came on for hearing.

Mr. Serjeant *Sargood*, and Mr. *H. W. Lord*, for the Appellant:—

[Sir *R. Palmer*, Q.C., for the Respondents, the Petitioning Creditors:—There is a preliminary objection to the hearing of this case. It is not an appeal, but an application to set aside an Order of adjudication, which ought to have been made to the Court below.]

[LORD CAIRNS having suggested that this objection could be considered after hearing the case, the Counsel for the Appellant proceeded.]

The object of the Appellant is to obtain the revocation of his adjudication in Bankruptcy in *Hong Kong*, but not being able to apply to the Supreme Court there within the period limited by the Ordinance of 1864, he is compelled to apply to this Tribunal, as the Court of appeal from the Colony. The rule as laid down

in *Carter* v. *Dimmock* (1) is applicable here. The adjudication was complete in *London* against the Appellant on the 18th of April, 1867. The deed of assignment of the Appellant's and his co-partners' estate was executed in *Hong Kong* on the 2nd of May, 1867. No doubt the execution of that deed was an act of bankruptcy within the terms of the Ordinance of 1864, but the power of Attorney under the authority of which it was executed on behalf of the Appellant was revoked by his adjudication in Bankruptcy in *England* on the 18th of April.

[LORD CAIRNS:—The power of attorney enables *Still* to file a petition in Bankruptcy, or to execute a deed of composition, on behalf of the Appellant; how is that part of the power expended? it may be so as to the property, but how as to the *status?* His being Bankrupt in *England* is not inconsistent with his becoming so in *Hong Kong.*]

The whole course of practice is, where there are two adjudications to see which is to be sustained. The right to annul rests under section 51 of the *Hong Kong* Bankruptcy Ordinance. That section is taken from, and in terms is similar to, the 104th section of the *Bankruptcy Act*, 12 & 13 Vict. c. 106, and the time limited, twenty-one days in case of a party residing out of the Colony, is provided by the 182nd section of the *Hong Kong* Ordinance, which is in terms similar to the 233rd section of the English Statute. We were not able to take steps to amend the fiat or adjudication within the time there provided. In the case of the English *Bankruptcy Act* it has been held, that if the adjudication is not contested within the term there limited, a Commissioner in Bankruptcy, under sect. 233, has no power: *Ex parte Carter* (2); *Carter* v. *Dimmock* (3); but the aid of the Court of appeal must be sought. By the General Order in Bankruptcy, No. 5, where there are several petitions it is directed that the second shall not be allowed to proceed. Two adjudications are never tolerated: *Ex parte Crew* (4); *Till* v. *Wilson* (5); *Morgan* v. *Knight* (6). Thus, however good the adjudication may be against *Still* and *Maclean*,

(1) 4 H. L. C. 337.
(2) 1 De G. M. & G. 212; 20 L. J. (N. S.) (Bky.) 19.
(3) 4 H. L. C. 337; 22 L. J. (N. S.) (Bky.) 55.
(4) 16 Ves. 237.
(5) 15 C. B. (N.S.) 669.
(6) 7 B. & C. 684.

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it ought not to stand against *Lyall*. The adjudication in *England* against him dissolved the partnership: *Ex parte Williams.* (1) The Appellant is in a serious position. He cannot obtain his discharge, not having surrendered within the time appointed. He is willing to confirm the acts of the Assignees in *Hong Kong*. His discharge under the English Bankruptcy will not assist him while this adjudication remains. The petition of the Partners could not bind him. The just inference from the judgment is, that the adjudication was made on the deed of the 2nd of May, 1867, the proper time: his position is one of great jeopardy. The English *Bankruptcy Act* contains no power to the Court to review its finding except, under section 148, in cases of fraud. That section is not applicable in this case.

Mr. *J. D. Bell* (with him, Mr. *Baldwin M. Smith*), for the Official Assignee (2):—

Special leave to appeal was obtained under a mis-statement as well as a suppression of the facts. The petition on which leave was granted stated the circumstances of the adjudication in *London*, which was never before the Court in *Hong Kong;* it omitted all mention of the power of attorney granted to *Still*, and of the Appellant's Counsel having consented to the adjudication under it; and it alleged, that the Appellant had no notice of the adjudication, it being now admitted by the Appellant's case that he had notice soon after the adjudication. There being both suppression and misrepresentation in the petition upon which special leave to appeal was granted, the appeal ought now to be dismissed: *Sibnarain Ghose* v. *Hullodhur Doss* (3); *Wilson* v. *Callender* (4). The adjudication in *Hong Kong* is good. The petition was filed in the Supreme Court there at 3 P.M., on the 18th of April, 1867, which would be about 8 A.M. in *England;* so, in fact, it was presented before the English adjudication, which must have been later in the day. If the adjudication were under the 10th section it could not have been made without personal service, but the adjudication is good under the 16th and 35th sections (5). Such an adjudication requires no

(1) 11 Ves. 3.

(2) Their Lordships refused to hear more than one Counsel for each Respondent.

(3) 9 Moore's P. C. Cases, 354.

(4) Ibid. 100.

(5) Sect. 35 is as follows:—"If any Debtor petitioning against himself,

personal service. There was also an act of Bankruptcy in fact, although unknown at the time of the adjudication under sect. 12, which, if the Court had been applied to, to rehear the matter of the adjudication, it could have taken into consideration, as a ground for not revoking the order; this Tribunal, under the circumstances, can do the same. There is no objection to the joint adjudication, notwithstanding the separate adjudication in *England;* there may be two adjudications: *Morgan* v. *Knight* (1). Bankruptcy will not annul the power of the constituted attorney to petition the Court, or do other acts on behalf of the Bankrupt: *In re MacDonnell* (2).

Sir *R. Palmer*, Q.C. (Mr. *Watkin Williams* with him), for the petitioning Creditors:—

This Tribunal is asked to exercise original jurisdiction and to give a *locus standi* to evidence which could not have been considered by the Court below. It is absurd to call this an appeal. Her Majesty is asked to act, through the Judicial Committee, as a Court of Bankruptcy hearing an original cause. Her Majesty has no such jurisdiction. Unless it is to be said that in all parts of the world local Courts are to be prevented interfering where there is the accident of a home Bankruptcy, this appeal must fail. Why should there not be two adjudications? The case on its merits must fail, independently of the unanswerable objection of this being an original case and not an appeal. There was no occasion to join the petitioning Creditors as Respondents. The Official Assignee could represent all Creditors.

Mr. *De Gex*, Q.C. (Mr *Holl*, with him), for the Respondents, the Partners of the Appellant:—

So long as we are not injured by the adjudication being set aside, we cannot object; but we are clearly entitled to costs.

Mr. Serjeant *Sargood*, in reply:—

The Official Assignee has no right, as a public Officer, to attribute to the Appellant a wilful concealment of facts. There has been no

shall not obtain adjudication within seven days after filing such petition, the Court may proceed to adjudge the Debtor bankrupt on the petition of any competent Creditor."

(1) 33 L. J. (N. S.) C. P. 168.

(2) Buck's Bky. Cases, 399.

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opportunity for him to go to *Hong Kong* without prejudicing his position in the English bankruptcy. As to making the petitioning Creditor a party, in the *Duke of Newcastle* v. *Morris* (1), before the House of Lords, the petitioning Creditor only was served.

LORD CAIRNS:—

Their Lordships have, in the first instance, to advert to the circumstances under which special leave to appeal was granted in this case. Nothing can be more important than that it should be understood that those who come before this Committee upon an *ex parte* application for leave to appeal should consider it their absolute duty to state, in the fullest and frankest way, every circumstance connected with the history of the case which possibly can have any bearing on the leave for which they ask. Now, their Lordships do not mean to attribute, either to the Appellant, or to his advisers, any intentional disregard of this duty, or any wish in the petition which they presented in the year 1868, to suppress any fact which they might have thought material; but, unfortunately, the petition is one which, when looked at, cannot be described otherwise than as a petition which was calculated to mislead the Tribunal before whom it was heard. It states, in substance, that the Appellant had been adjudicated a Bankrupt in *London* on the 18th of April, 1867. It does not suggest that that had been done, either on his own application, or upon an act of Bankruptcy committed by him with a view to have the application made by a friendly Creditor. It then proceeds to state, that while he was thus in *England* adjudicated a Bankrupt; on the 21st of May, 1867, certain Creditors of his firm in *Hong Kong* had filed a petition in the Court of that Colony for the purpose of making the firm Bankrupts, and that on that petition they had been adjudicated Bankrupts. He does not state that there had been any declaration of insolvency filed by the Firm with a view to their Bankruptcy in the Colony, or that he had given a power of attorney to his Partner in the Colony, enabling him to take the proceedings proper to lead to a Bankruptcy, or that there had been a conveyance or assignment of their property executed by the Partners abroad, and by one of

(1) Law Rep. 4 H. L. 661.

them as Attorney for himself, with a view to bring about an adjudication in Bankruptcy. It is treated as an adverse proceeding in the Colony, just as the proceeding in Bankruptcy in *London* is treated as an adverse proceeding against Mr. *Lyall*. It then proceeds to state that "during the time of these Bankruptcy proceedings in the Colony, and from thenceforward, Mr. *Lyall* had been residing in *England*, had no notice of the adjudication, and was thereby rendered unable to shew cause against the validity of the same within the time limited by, and pursuant to, the provisions of the Bankruptcy Ordinance, 1864." It does not state, that under the professed authority of the same power of attorney consent had been given in the Colony to expediting and making perfect, as far as consent could do it, the proceedings in Bankruptcy; but it treats the whole of those proceedings as proceedings which Mr. *Lyall* would, in every way, have opposed and objected to had it been in his power. It assumes, rather than expressly states, that he had come before this Tribunal at the earliest moment, for the purpose of protecting rights which had been infringed; and it does not state, what now appears to have been the case, that upon the 8th of July, 1867, Mr. *Lyall*, who must have known before of the power of attorney which he had given, had become aware that that power had been acted on, and that those proceedings in Bankruptcy in the Colony had taken place, and that from the 8th of July, 1867, when he had this knowledge, until the 12th of May, 1868, a period of about ten months, he had remained quiescent, and had taken no step, either in the Colony or here, for the purpose of disputing the proceedings in Bankruptcy. Under those circumstances, upon statements so eminently insufficient to put this Tribunal in possession of a knowledge of all that had occurred, and aided, doubtless, by the view which seems to have been entertained by the advisers of Mr. *Lyall*, which, no doubt, was pressed upon their Lordships, that after the shorter period of a few weeks, mentioned in the *Hong Kong* Bankruptcy Ordinance, there was no remedy in the Colony, and the only remedy could be here, their Lordships granted the leave to appeal.

Stopping at this part of the case, their Lordships cannot but think, that if the whole facts, which I have endeavoured to state, had been made known to their Lordships upon the face of this

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petition, they would have felt themselves unable, under the circumstances, to have granted the leave to appeal which was given.

Passing, however, from that, their Lordships have next to consider whether, this leave having been granted, the appeal is one which they properly can entertain.

Now, the Appellant is obliged to come here virtually confessing, at the outset, that if he is limited to the materials which were before the Judge in the Colony at the time that this adjudication was made, and if he is not allowed to import into the case the other facts with regard to the *London* Bankruptcy, and its bearing upon what was done in the Colony, he is unable to sustain his appeal, and is unable to deny that the proceedings in the Colony were regular. In that view of the case they clearly would be regular. There was an assignment by the three Partners of all their property, an assignment executed by two, and by one of the two as Attorney for the third, under a power which clearly authorized him to execute that assignment. There was, therefore, an act of Bankruptcy—there was a trading; there were all the requisites proper to found a Bankruptcy, and there was a proper adjudication upon those requisites, and upon those materials there would be nothing to argue.

Admitting that on the materials before the Judge the Order was proper, the Appellant has to contend that this Tribunal should look at the other facts which had occurred at the time, although they were not known to the Judge, viz., the English bankruptcy and its bearing upon the Colonial proceedings; and he has to contend that, looking to the whole of those facts, the order is one which ought not to be supported. Now, their Lordships desire to intimate their opinion with great distinctness that that is not a purpose for which this Tribunal can be resorted to. This is an appellate Tribunal—an appellate Tribunal, no doubt, which possesses large powers to admit in proper cases, by way of supplement, evidence upon points which upon the hearing may appear to require to be elucidated, but this is certainly not a Tribunal to which resort can be made by those who are obliged at the outset to confess, that they have no case for appeal as the matter stood before the Judge who heard the case in the Colony, and that their only ground for

appeal is the introduction of other matters which were in no way before the Judge of primary instance.

Their Lordships further think that there is nothing whatever in the construction of the 182nd section of the *Hong Kong* Bankruptcy Ordinance which would have prevented, but that there is everything which would have empowered the present Appellant, if he had been prepared to bring before the Judge in the Colony further evidence leading to a different conclusion from that to which the Judge arrived in adjudicating in the first instance, to have gone to the Judge in *Hong Kong* within the prescribed period of twelve months, to have brought those further questions before him, to have taken his decision, by way of rehearing upon this new matter, upon the whole of the case; and then would have been the time, if the Appellant had been dissatisfied with the decision of the Court, that his right might have arisen to appeal to Her Majesty in Council.

Their Lordships observe that the case of *Carter* v. *Dimmock* (1), decided in the House of Lords, which was referred to in argument, does not appear to them to have any contrary bearing to the conclusion at which they have arrived. In that case it appeared that the Bankrupt, having abstained from shewing cause against the adjudication, although he was in the Country, and might have done so within the shorter time appointed by the English Statute, afterwards applied to the Commissioner in *London* within the twelve months, not upon any new materials, but simply for the purpose of disputing the propriety of the adjudication upon the materials upon which it was made, and against which he might have shewn cause within the proper time. The House of Lords held, that this was a course which was not open to him; and Lord *Cranworth,* in pronouncing the decision of the House of Lords, states expressly that it was only playing with words to treat that proceeding as anything but an appeal; that the second application to the Commissioner, without any change of the materials upon which it was to be supported, was simply appealing to the Commissioner from his own Order, and upon the same materials; and that on the proper construction of the English Act, the course which ought to have been taken was to make an application in

(1) 4 H. L. C. 337.

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such a case to the Court of appeal, viz., the Lords Justices, and not to the Commissioner. Those remarks have no relevancy to a case where the second application to the primary Court is made, not on the same, but on different materials.

Their Lordships, therefore, upon this ground alone, would feel themselves unable to entertain this appeal, and this observation is sufficient for its disposal. Their Lordships, however, are bound to add that, although they do not propose to travel out of their proper functions, and to decide as a Court of first instance upon the merits of a case which never was brought before the Judge at *Hong Kong*, they have not been satisfied by any argument which they have heard, that if this matter had been brought, with these new materials, before the Judge in the Court at *Hong Kong*, it would have been the duty of that Judge to have superseded or annulled the Bankruptcy. There appears to have been an act of Bankruptcy constituted, if not by the assignment made subsequent to the *London* Bankruptcy, yet by the declaration of insolvency filed by the two Partners upon the spot, and signed by them on behalf of their absent Partner as well as of themselves; and that at the time when there had been dispatched to one of those Partners a power of Attorney which clearly gave him authority to file a declaration of that kind. Their Lordships are not satisfied that the circumstance, that before the proceedings in Bankruptcy were taken in that Colony there had been a *London* Bankruptcy of Mr. *Lyall* alone would necessarily have prevented, or ought properly to have prevented, the adjudication against the firm in the Colony. It might give rise to questions between the Assignees under the two Bankruptcies as to what were their relative rights of property, but their Lordships are by no means satisfied that it would not be altogether within the power and discretion of the Court, after a separate Bankruptcy against one of the Partners in *England*, to have a joint Bankruptcy against the firm, upon proper materials, in the Colony, leaving it, of course, open to the English Assignee to make any application as to the conduct of that Bankruptcy, or the rights under it, which he might be advised to make; and they are not satisfied that it would lie in the mouth of Mr. *Lyall* —especially after the power of attorney which he executed, after the appearance made on his behalf under that power in the Court by Counsel,

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after the consent given on his behalf under that power to the completion of the proceedings in Bankruptcy in the Colony—in any way to quarrel with what had been done by those proceedings.

Upon the whole, their Lordships are clearly of opinion, that it is their duty to advise Her Majesty that this appeal should be dismissed, with costs to be paid to the various Respondents. Their Lordships are informed, that there is a sum of £300 deposited. Supposing the taxed costs of each Respondent amount to a larger sum than one-third of that amount, it will be divided rateably among the three Respondents.

The costs, on taxation, being nearly equal, £100 was awarded by the Registrar to each set of the Respondents.

Solicitors for the Appellant: *Lawrance, Plews, Boyer, & Baker.*

Solicitors for the Respondents, *Jardine, Matheson, & Co.: Freshfields.*

Solicitors for the Respondents, *Still & Maclean: Ambrose Parsons.*

Solicitors for the Official Assignee, *Huffam: Bailey, Shaw, Smith, & Bailey.*

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THOMAS NYE . . . . . APPELLANT;

AND

JAMES MACDONALD . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE.)

French Law in Lower Canada—Petitory action to recover possession of land—Certificate of Notary public in Upper Canada, effect of, in Lower Canada.

By the French Law prevailing in *Lower Canada* a Certificate of a Notary public in the Province of *Lower Canada* is sufficient evidence in the Courts of that Province of the due execution of the instrument referred to in the Certificate, and identity of the parties thereto, but the Certificate of a Notary public in *Upper Canada*, where the English Law prevails, will not be re-

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* *Present:*—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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ceived in the Courts in *Lower Canada per se* as proof of due execution of an instrument, or of the identity of the parties; such fact must be established by evidence, as required by English Law.

In a petitory action brought in the Superior Court in *Lower Canada* to recover land in that Province, the material evidence of title of the Plaintiff consisted of a deed of sale by a Devisee, whose Husband's christian name, as it was alleged, was wrongly described in the Will of the Testator. The deed of sale was executed under a power of attorney, and the only evidence of the identity of the parties was the Certificate of a Notary public in *Upper Canada* that such power was executed before him by the Devisee and her Husband. The Courts in *Lower Canada* refused to give effect to the Certificate in the absence of proof of identity of the parties named therein, and dismissed the Plaintiff's action. On appeal, the Judicial Committee affirmed this decision on the ground, (1), of the absence of evidence of identity of the parties executing the power of attorney, as being those described in the Will of the Testator; and, (2), that the same weight of evidence in a Court governed by the Law of *France* could not be given to the Certificate of an English Notary public as to a Certificate of a French Notary public.

THIS was a petitory action, in the nature of ejectment, brought in the Superior Court for *Lower Canada*, now the Province of *Quebec*, by the Appellant against the Respondent, to recover possession of a piece of land, being the easterly half, containing about 100 acres, of a lot of land containing about 200 acres, known as Lot 27 in the sixth concession, in the Township of *Godmanchester*, in the District of *Montreal*.

The principal question was, whether the Appellant had given sufficient proof of the execution of a power of attorney, under the authority of which a deed of sale conveying Lot 27 to the Appellant purported to have been executed.

The Appellant's title rested chiefly upon such deed of sale, which purported to have been executed to him by one *Teeples*, as Attorney for the Grantors, *Alexander Lake* and *Mary* his Wife. To this deed of sale, copies of the power of attorney and of the certificate of a Notary public in *Upper Canada* were attached. The Appellant's case was, that, on the issues raised, he was not bound to give specific proof of the fact of the execution of the power of attorney. The Respondent objected to the reception as evidence of the Certificate of the Notary public on the ground, that the Courts in *Lower Canada* would not admit the legal sufficiency *per se* of the Certificate of a Foreign Notary to authenticate the documents in evidence without evidence of identity, as the cer-

tificates of Foreign Notaries had not the same legal effect as those of Notaries in *Lower Canada*.

The declaration alleged, that by a deed of sale of the 11th of November, 1841, executed at *Montreal*, before one *Doucet* and his colleague, Public Notaries, *Alexander Lake*, otherwise called *James Lake*, and *Mary* his Wife, both of the Township of *Loughborough*, by their Attorney, *William Teeples*, duly appointed in virtue of a power of attorney annexed to the deed, sold Lot 27 to the Appellant. That the Respondent had unjustly obtained possession of the easterly half of Lot 27, and had since his unjust possession received the rents, issues, and profits thereof; and it was prayed, that the Appellant might be declared Owner of the easterly half, and the Respondent adjudged to deliver up the same, with the rents, issues, and profits, from the time of his unjust possession, and in default that he be ejected, and pay the Appellant £600 currency as damages.

The Respondent pleaded, in substance, first, a demurrer to the action (which was overruled); second, that neither the Vendors of the Appellant nor their *auteurs* ever had any title to the land, and that the Respondent was in possession as proprietor at the time of the pretended sale to the Appellant; third, prescription of ten years under a good translatory title; fourth, prescription of thirty years; fifth, a plea setting up improvements made by the Respondent, and praying that he might be authorized to retain possession of the land until the Appellant paid him the value of the improvements; and, lastly, the general issue.

The Appellant demurred to the third, fourth, and fifth pleas of the Respondent. These demurrers were overruled, and he answered generally the first, third, fourth, fifth, and sixth pleas of the Respondent, and to the second plea, by alleging title, as follows: That on the 4th of January, 1814, His late Majesty, King *George* III., by Letters Patent under the Great Seal, granted Lot 27 to *John Rankin*, in trust for himself and his Brothers and Sisters, *James*, *David*, *Mary*, and *Elizabeth*, his and their heirs and assigns for ever, in free and common socage; that of those Grantees, *John*, *James*, *Mary*, and *Elizabeth* died intestate, leaving, from and after the 24th of March, 1829, *David* the only surviving heir and representative and proprietor of the Lot. That *David*

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Rankin, by his Will, executed in *Upper Canada*, on the 28th of September, 1832, devised the Lot to *Mary Lake*, whom he described as Wife of *James Lake*, of *Loughborough*, Yeoman, and to her heirs and assigns; that *David Rankin* died in 1833, and that the Will was proved in that year; that *Mary Lake*, in conjunction with her Husband, *Alexander Lake*, otherwise called *James Lake*, at *Kingston*, in *Upper Canada*, on the 8th of October, 1841, executed a power of attorney to *Teeples*, in the presence of witnesses, one of whom, *Samuel Rorke*, was a Notary Public, who then and there signed his certificate attesting the due execution of the power of attorney; that the deed of sale mentioned in the declaration was executed under this power of attorney; that the power of attorney, the certificate of *Rorke*, and a Certificate of the Administrator of the Government of the Province that *Rorke* was a Notary public, were deposited with *Doucet*, one of the Notaries before whom the deed of sale was executed; that thus the title of *David Rankin* became vested in the Appellant under the deed of sale, and that the Respondent had acknowledged *David Rankin* as sole proprietor, more particularly by a Letter of the 4th of October written by him to *David Rankin*.

The Respondent replied generally to the answer of the Appellant.

The Appellant put in evidence a copy of the Letters Patent of 1814; extracts from Registers proving the deaths of *John*, *Mary*, *James*, and *Elizabeth Rankin*; copy of the probate of the Will of *David Rankin*; the power of attorney from *Alexander Lake*, who was called in the Will of *David Rankin*, "*James Lake*," and *Mary Lake* his Wife, to *William Teeples* to sell the land devised in the Will. This document was executed by *James Lake* and his Wife in the presence of two witnesses, *Henry Smith*, junior, and *Samuel Rorke*, a Notary public. To this power of attorney was annexed the notarial certificate of *Samuel Rorke*; with a certificate of Sir *R. D. Jackson*, the then Administrator of the Government of the Province of *Upper Canada*, that *Rorke* was a Notary public of *Upper Canada*; also a copy of the deed of sale, certified by *Doucet*, the Notary public, before whom the deed was passed, and in whose office the original remained; with two Letters supporting the allegation that the Respondent had acknowledged the title of *David Rankin*. There was oral evidence to connect the Respondent with

the last-mentioned Letters. There was no evidence that *Alexander Lake*, described in the Will of *David Rankin* as "*James Lake*," was the identical party who executed the power of attorney. No proof was offered by the Respondent of a translatory title. The witnesses confined themselves to the length of Respondent's possession, and the value of his improvements. Their evidence carried back the Respondent's possession to the year 1821.

The case was heard upon the merits, and on the 31st of October, 1857, the Superior Court, *coram* the Justices *Day*, *Smith*, and *Mondelet*, unanimously gave judgment, dismissing the action with costs, on the ground, that the Appellant had failed to establish by evidence the material allegations of his declaration, and more especially that *Teeples* was the Attorney of *Mary*, Wife of "*James Lake*," mentioned in the Will of *David Rankin*, duly authorized to sell the land.

From this judgment the Appellant appealed to the Court of Queen's Bench, and on the 6th of December, 1864, that Court, consisting of the Chief Justice *Duval*, and the Justices *Meredith*, *Drummond*, *Badgley*, and *Loranger*, gave judgment, affirming the judgment of the Court below. Mr. Justice *Loranger* dissenting, as in his opinion the title of the Appellant's Vendors was proved, and the validity of the sale from them to the Appellant was admitted upon the pleadings.

The material portion of the reasons of the majority of the Judges for their judgment, prepared and sent with the Record to *England* by Mr. Justice *Badgley*, was as follows:—"It will be observed that the entire title, from the Crown grant inclusive, has been set out in the special answer to the Respondent's pleas; and from the facts stated, no difficulty can exist in ascertaining what requires to be established in evidence. At the date of the Will of *David Rankin*, as well as at the date of the deed of sale, and for many years previous to either, the Respondent had been in possession of the east half of the Lot. It must also be observed, in addition to the fact of the power of attorney having been executed at *Kingston* before witnesses, that attached to the power was a Certificate or writing certified by the attesting witness, *Rorke*, himself, in which he states that '*Alexander Lake* and *Mary Lake* did appear before him, *Samuel Rorke*, Gentleman and Notary public,

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and in his presence, and in the presence of *Henry Smith* the younger, Esquire, they signed, sealed, executed, and delivered as their deed the annexed power of attorney.' *Rorke* then proceeded to certify 'that the signature '*Hy. Smith*, Jr.' and also his own '*S. Rorke*, N. P.' were set and subscribed at the same time as witnesses to the execution of the instrument. Witness his hand and notarial seal, &c.' Appended to this is a Certificate of the then Administrator of the Province, certifying that *Samuel Rorke* is a Public Notary of *Upper Canada*, and that faith is to be given to his signature and acts in that capacity. As the Appellant's *demande* is *au pétitoire*, it must rest upon the legal sufficiency of his title as established by him of record, and not upon the good or bad faith of the Respondent. Without adverting to what may be called the circumstances and facts proved of secondary importance, it will suffice to state what are essential and of primary importance to support the case, and which have not been established in evidence. First, the original deed of sale professes to have attached to it the original power of attorney, the original Certificate by *Rorke*, and the authentication of the Administrator of the Province. None of these original documents have been exhibited or proved with the record submitted to the Court, and copies only have been produced, certified under the hand of the same instrumenting Notary who passed the deed of sale, whose Certificate to the copies carries no proof or authentication in itself of these copies. Secondly, the death of *David Rankin*, the Testator, is not proved, unless the Probate at *Kingston* be adopted, which is plainly not sufficient according to our jurisprudence. Thirdly, the devise is made to *Mary*, Wife of *James*, but the declaration and the special answer both allege that she, *Mary*, is the Wife of *Alexander*, otherwise called *James*, but no proof of this fact exists, nor of the identity of *Alexander*, her alleged Husband, mentioned in the declaration and answer, with *James*, her alleged Husband, mentioned in the devise under the terms of the Will. Fourthly, the power of attorney by *Mary* and her Husband, *Alexander*, to *Teeples* was executed before two witnesses, but it is not produced, nor are the signatures of those constituents or of the witnesses proved as required by the law of *Lower Canada*. Fifthly, the power is accompanied by the Certificate of its execution made

by *Samuel Rorke*, one of the attesting witnesses, who is certified by the Administrator of the Province to be a Notary public of *Upper Canada;* but the certificate of the Administrator can only authenticate the official character and signature of the witness, but does not and cannot authenticate the execution of the instrument, nor give any legal effect to *Rorke's* office and signature beyond what the law of *Lower Canada* recognises. And, sixth, *Rorke's* Certificate, as that of a Notary public of *Upper Canada*, to the execution of the instrument is by our Law of no more legal proof than the certificate of a mere witness under his hand, and having no official legally recognised power of authentication; his Certificate not under oath is of no effect. The difference between the Notary public of *Lower Canada* and the Notary public of *Upper Canada*, or of *England*, or the *United States* generally, is too evident to require comment; the full power of authentication attaching to the official signature of the *Lower Canada* Notary may be said to be almost unknown to those Officers abroad, or is attached to them for very limited purposes, chiefly in commercial matters. The point of view in which the authority of this Officer is to be considered generally relates to those commercial transactions occurring in one country which are to be proved in another, or in which Foreigners are interested, and the office derives its existence from the courtesy of one nation to another, and where he is to do certain things by Statute the authority is limited to the designated objects. In *Ex parte Church* (1) it was held, that a Notary's Certificate is in general only evidence of such acts as he does under the *lex mercatorii*, and that has been recognised in several cases. In *England*, 'the certificate of an American Notary under his seal, of the fact of a power of attorney having been executed in his presence, which certificate was verified by the British Consul, has been held no evidence of the due execution of the power. There was a subscribing witness to the power, and the Court said, that they could only look upon the affidavit of the subscribing witness, we know of no instance in which the Court has dispensed with such evidence of the execution of an instrument.' The above case is parallel with the present, except in that case the authentication of the notarial office by the British Consul, and in this case by the Administrator

(1) 1 Dow. & Ry. 324.

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of the Province. Seventhly, the instrumenting Notary's attestation, by his official signature, of the copies produced by him and attached to his *copie authentique* of the deed of sale, is not sufficient proof of the authenticity of the documents so copied, and can give no effect to these copies in the place of their originals. There is no question that, in proceedings before Courts of justice in *Lower Canada* all matters of proof and evidence are governed by the *lex fori*. It is unquestionable that *locus regit actum*, that is, that the law where the contract is made, must govern as to the validity, construction, or effect of such contract. But the remedy sought for, through the Tribunals of this Province, must be regulated by the *lex fori*, and this, too, notwithstanding that the litigating parties may be subjects of a Foreign State. Under these circumstances, the procuration not having been established in evidence according to our legal requirements, the execution of the deed under that power is insufficient and invalid as regards the Respondent, and hence, therefore, without adverting to fatal defects in the record, the Plaintiff has not established his title, and the judgment appealed from must be sustained."

The appeal was from this judgment of affirmance.

Mr. *F. W. Gibbs* (Mr. *Garth*, Q.C., with him) for the Appellant:—

First, as regards the pleadings. On the issues raised the Appellant was not bound to take issue specifically on the facts alleged by him; as to the due execution of the power of attorney, such execution was admitted by the pleadings. The effect of a *défense au fonds en fait* is equivalent to the general issue, and is defined by the *Lower Canada Act*, 12 Vict. c. 38, s. 85; Consolidated Statues of *Canada*, c. 70, s. 6; and it was acted on in *Forbes* v. *Atkinson* (1), and *Copps* v. *Copps* (2). Secondly, as to the rejection of evidence tendered by the Plaintiff. The objection in the Court below that copies of documents are insufficient evidence is untenable, the filing of copies with the production of the original, is sufficient. Even if the power of attorney was not sufficiently admitted on the pleadings, the Plaintiff has established by evidence sufficient in law that *Teeples* was the Attorney of *Mary* the Wife of *Alexanker Lake*, mentioned in the Will of *David*

(1) Stuart's Low. Can. Reps. 166, n. (2) 2 Low. Can. Reps. 105.

Rankin as *James Lake*, and that she had duly authorized him to sell the land in question. In *Rex* v. *The Scriveners' Company* (1), Lord *Tenterden* says: "Many documents pass before Notaries under their notarial seal, which gives effect to them, and renders them evidence in Foreign Courts." In Courts of Equity the Certificate is good; thus in *Garvey* v. *Hibbert* (2) money was ordered to be paid under a power of attorney executed in *North America*, attested by a Notary public. So in *Lord Kinnard* v. *Lady Saltoun* (3), the power of attorney was executed in *Paris*, and authenticated by a Notary at *Paris*, and then acted on by the Accountant-General. [LORD CAIRNS:—Here the Notary does not identify the parties.] It is the duty of a Notary to know the parties before him. By the *lex fori* in *Lower Canada*, the Courts administering the Old French Law were bound to admit the certificate as evidence. The only express exceptions are commercial matters in English Law, enacted by the 25 Geo. 3, c. 2, s. 10; Consolidated Statutes of *Lower Canada*, c. 82, s. 17, p. 698. A Notary Public has two characters, one of universal sanction, and the other municipal. He is not merely a Commercial Officer, and the Court below was wrong in applying English Law. In *Lower Canada* and *France* the character of a Notary public is different. His general, as distinguished from his municipal character, is recognised by the Law of *France: Pothier, Traité de l'Hypothèque*, ch. 1, s. 4, *Tom.* 8, p. 528-9; *Toullier, Tom.* 10, ch. VI., s. 3, art. 1; *Fœlix, Traité du Droit International privé, Tom.* 1, p. 324. Lastly, admitting that the Appellant's title is established, the fact of the Respondent having incurred expense in improvements on the land will entitle him to compensation so that he will be indemnified: *Lawrence* v. *Stuart* (4).

Mr. *Vernon Harcourt*, Q.C., and Mr. *H. M. Bompas*, for the Respondent, were not called on.

LORD CAIRNS:—

In this case the Appellant, about twenty-one years ago, brought an action in the Courts of *Lower Canada* against the Respondent, for the recovery of a lot of land which is described in the plead-

(1) 10 B. & C. 519.
(2) 1 J. & W. 180.
(3) 1 Mad. 227.
(4) 6 Low. Can. Rep. 294.

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ings. The Appellant claimed title to that lot under a grant originally made to a person of the name of *John Rankin*, and proposed to deduce his title from that *John Rankin*.

It is necessary to consider, in the first place, what was the character of the issue raised by the pleadings with regard to the title of the Plaintiff, because it has been contended that certain matters of evidence with regard to his title, which it otherwise would have been necessary to have proved in the regular course, were removed out of the region of proof, by reason of admissions which are said to have been made in the pleadings between the parties.

The declaration had stated a deed of sale, by which this lot of land had been conveyed to the Appellant from those who had the right to convey it, and in answer to that declaration, the second plea, after alleging possession for a certain length of time by the Respondent of the lot in question, averred distinctly, "that the persons from whom the Plaintiff pretends to have purchased the said real estate, never had, nor hath the Plaintiff ever had, nor have they, or either of them, any right, title, interest, possession, or property of, in, or to the said real estate, or any part thereof." It is possible (their Lordships express no opinion upon the point) that at that stage of the pleadings the Appellant might have taken issue upon this part of the second plea, and gone to trial upon those general allegations as they stood up to that point, putting in evidence the proof of the different links of the title under which he claimed; but in place of doing that, the Appellant met the second plea by an extremely special replication or answer. He professed on the face of that answer to answer the second plea, and the character of his answer (it is unnecessary to read it at length) was in substance a statement of what may be termed his abstract of title. It was a statement in an abstract form of the various stages of the title, commencing with the Letters Patent to *John Rankin*, then setting forth the Will of one *David Rankin*, then stating the seizin of persons of the name of *Alexander*, otherwise called *James Lake* and *Mary Lake*, under the Will of *David Rankin*, and stating further the execution of a power of attorney to one *Teeples*, by *Lake* and his Wife, under which power of attorney, and a Deed executed in virtue of it, the Appellant claimed.

To that answer a replication was put in by the Respondent saying, "that all and every the allegations, matters, and things in the said special answer contained and set forth, save and except in so far as they corroborate and confirm the allegations, matters, and averments of the Defendant in his said second plea contained and set forth, are, and each and every of them is, false, untrue, and unfounded in fact."

Now, without turning to the *défense au fonds en fait*, or considering what the effect of that would have been if it had stood alone, either by Statute or otherwise, in the lower Courts of *Canada*, their Lordships are clearly of opinion, that both upon the most technical construction which can be applied to pleading, and also upon the substance and sense of these pleadings, there was here the clearest putting in issue, on the part of the Respondent, of every stage and point in the title which was alleged on the part of the Appellant. It may be added, that there appears no reason to suppose that the Respondent could possibly have known anything with regard to the particulars of the title of the Appellant, and it would indeed have been strange if he had taken upon himself in a suit of this kind to admit any links of that title; but in point of fact he did not do so. On the contrary, in the plainest way that words could do, he traversed every stage of the allegations which the Appellant had made.

Their Lordships, therefore, are obliged to approach the further questions in the case, the questions which have arisen with regard to the evidence, and the sufficiency of the evidence, with the clear opinion, that so far as pleading could go, there was no admission of anything which could otherwise be the subject of evidence; but on the contrary, the Appellant was challenged to produce, in the strictest form, the evidence necessary to support his title.

Now, there were two most important links in the chain of the Appellant's title. *David Rankin* had made a Will by which, assuming him to have a good title to the Lot in question derived from the Grantee under the Letters Patent, he devised and bequeathed this lot to *Mary Lake*, whom he described as the "Wife of *James Lake*, of *Loughborough*, Yeoman, and adopted Daughter of the late *James Bleakaby*, of *Loughborough*, Yeoman, deceased." It appears that in the power of attorney under which the Appellant

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claimed, the persons giving and executing that power of attorney called themselves "*Alexander Lake*, and *Mary Lake* his Wife;" and on the face of the power of attorney it was stated that this *Alexander Lake* was the same person who, in the Will of the Testator, *David Rankin*, was called "*James Lake*." That may be perfectly true. Mistakes of that kind not unfrequently happen, and although such mistakes are by no means fatal to the devise in which the mistake may occur, yet it would be obviously necessary for the person claiming under a Will of this kind to adduce some evidence that the mistake which he alleges had actually taken place, and that he who now calls himself "*Alexander Lake*," was really the person whom the Testator meant to describe when he used the name "*James Lake*." Of course there are many ways in which that could have been done. Evidence might have been given as to the identity of *Mary Lake*. The person who was the adopted Daughter of *James Bleakably* might have been traced, evidence might have been given with regard to her history, and it might have been shewn that she, who appears thus to have been minutely described in the Will of the Testator, had married a person whose name was really *Alexander Lake*. Evidence of that kind, and I might say evidence, if uncontradicted, of a very slight kind, would probably have been sufficient to satisfy the Court that the mistake was the mistake of the Testator, and that the person who really was called "*Alexander Lake*" was the person whom the Testator meant to describe when he called him "*James Lake*," the husband of this *Mary Lake*.

However, no evidence of that kind appears to have been adduced; and at this point their Lordships consider that there was a complete hiatus in the title of the Appellant, and that there is no identity made out between the Devisee and the Husband of the Devisee named in the Will of *David Rankin*, and the persons who profess to execute the power of attorney, and who are therein called *Alexander Lake* and *Mary* his Wife.

But then, this power of attorney professes to have been executed by this *Alexander Lake* and *Mary Lake* before a Notary Public in the town of *Kingston*, in *Upper Canada*, and to have been executed by *Alexander Lake* and *Mary Lake* in the presence of two witnesses, of whom the Notary public was one. The first attesting

witness, *Henry Smith*, is not produced. The Notary public is not produced. But a Certificate is produced, given in the Province of *Upper Canada*, professing to come from *Samuel Rorke*, the Notary Public, and to be vouched by Sir *Richard Jackson*, the Administrator of the Government of the Province of *Canada*, who states in his certificate that "*Samuel Rorke*, whose name is subscribed to the foregoing notarial certificate, is a Notary public, duly appointed in and for that part of the Province of *Canada* formerly called *Upper Canada*." Now, the question arises whether in the Courts of *Lower Canada* regulated by French law the production of a power of attorney not proved by the attesting witnesses, but certified by the certificate—not upon oath—of the Notary public before whom it appears to have been passed, is sufficient in point of evidence,

Their Lordships may say, that upon this point there appears to have been no real difference between the learned Judges of the Courts below. There has been a difference between them, and one of them has thought the title of the Appellant sufficiently made out; but that, as their Lordships consider, is not because he differed from his Colleagues as to the effect of the evidence, but because he thought that upon this point evidence was altogether unnecessary, by reason of the form of the pleadings, a question upon which their Lordships have already expressed their opinion. The learned Judges may, therefore, be taken as agreeing that by the law of *Lower Canada* this certificate, given by a Notary public of *Upper Canada*, was not sufficient proof of the execution of the power of attorney.

In that opinion their Lordships entirely concur. A Notary public in the Province of *Upper Canada*, a Province regulated by English law, has no power, by English law, to certify to the execution of a deed in such a way as to make his certificate evidence, without more, that the deed was executed, and that it was attested in the manner in which the deed professes to be attested.

According to the law of *England*, the mere production of the certificate of a Notary public stating that a Deed had been executed before him would not in any way dispense with the proper evidence of the execution of the Deed. The circumstance that by French law a French Notary public has a greater power, and that his cer-

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tificate has a greater validity, does not appear to their Lordships to carry a power to the act of the English Notary upon English soil, so that that act when brought into question upon French soil should have the effect given to it there which is given by the law of France to the act of a French Notary public. The circumstance that an Officer is called in *France* a Notary public, with certain powers assigned to him by French law, and that in *England* there is also an Officer called a Notary public, with much more limited powers assigned to him by English law, would not in any way make the act of the English Notary public, when it is called into question in *France*, have the effect which it would have had if it had been an act done by a French Notary public upon French soil.

Their Lordships, therefore, are of opinion, that upon these two points, without going further, the Appellant failed altogether to make out his title in the Court below, and they will humbly recommend to Her Majesty that the appeal be dismissed with costs.

Their Lordships can only express the surprise they feel that if these points, which may appear to be, and are to a great extent, points of technicality, were points upon which the defects in the evidence to which they have referred could have been remedied, the much shorter and more inexpensive course was not taken of treating the action as having failed (as the learned Judges said it did fail) for want of evidence, and of bringing a new action supplying these defects, in place of going to the great expense and delay of an appeal to Her Majesty in Council.

Solicitors for the Appellant: *Wilde, Humphry, Wilde, & Berger.*
Solicitors for the Respondent: *Bischoff, Bompas, & Bischoff.*

ROBERT GRAHAM . . . . . APPELLANT;

AND

JOHN THOMAS POCOCK AND JOHN ALFRED MATHEW . . . . . } RESPONDENTS.

J. C.*
1870
July 21, 22.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

5 PC 17, 18
22

Cape of Good Hope Customs Ordinance, No. 6, of 1853, ss. 24, 25, 32, 50, construction of—Several entries in same Bill—Effect of—Omission of articles—Forfeiture—Penalties.

By the 24th section of the *Cape of Good Hope* Customs Ordinance, No. 6, of 1853, it is enacted, that no goods shall be laden or unladen from any Ship in that Colony until due entry shall have been made of such goods and warrants granted for the unlading of the goods. By sect. 25 it is provided, that the person entering any goods shall deliver to the Collector a Bill of entry thereof containing, amongst other things, the particulars of the quality and quantity of the goods and the packages containing the same. And by section 50 it is enacted, that "every person who shall assist or be otherwise concerned in the unshipping, landing, or removal or the harbouring of such goods" shall be liable to forfeiture, or in a penalty of the treble value thereof.

P. and *M.* were members of a Firm carrying on business at *Cape Town*, where *M.* acted for the Firm. *P.*, when in *England*, consigned to *M.* at *Cape Town* twenty-five cases of Glassware, and three cases, each of which contained a Carriage, and filled up the cases with Corks, which were liable to duty. When the goods arrived at *Cape Town M.* made out one entry for three cases containing the Carriages and twenty-five cases of Glassware; but made no entry in respect of the Corks. In actions for penalties by the Customs' authorities, *held*, on appeal, by the Judicial Committee, reversing the judgments of the Supreme Court of the *Cape of Good Hope*:

First, that by the 24th and 25th sections of the above Ordinance it was the duty of any person who applies to enter goods for the purpose of having them unladen, to state the particulars of the quality and quantity of the packages the unlading of which he asks for, and that by the omission in the entry by *M.* of the whole of the contents of the three cases containing the Corks, such cases were forfeited, it being an invalid entry of all the goods;

Secondly, as, under the Ordinance, an entry of goods may be valid though the same Bill of entry contains an invalid entry of other goods, therefore, that the cases containing the Glassware were not forfeited;

Thirdly, that *P.* and *M.* as Owners of the goods were liable to the treble penalties imposed by section 50, as *M.* was guilty of assisting or being "other-

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* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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wise concerned" in the unshipping of the goods within the meaning of that section; and

Fourthly, that a fraudulent intention is not necessary to be proved to render a person liable to penalties under sect. 50.

THIS appeal was brought from two several judgments of the Supreme Court of the *Cape of Good Hope* in actions brought by the Appellant, the acting Collector of and principal Officer of Customs of that Colony, against the Respondents. In the first action the Appellant prayed that certain goods might be declared to be forfeited for contravention of the *Cape of Good Hope* Customs Ordnance, No. 6 of 1853. By the second action the Appellant sought to make the Respondents liable for the sum of £769. 6*s.* 9*d.*, as forfeited under the same Ordinance, being treble the amount of certain goods, consisting of 3,350 gross of Corks, already declared forfeited, having been landed clandestinely. The Supreme Court, in the first action, held that the Corks, and three Carriages, which included the subject of the second action, were forfeited, but that the twenty-five cases of Glassware were not. In the second action the Court gave judgment for the Respondents.

The facts were these:—

The Respondents were co-partners carrying on business in *Cape Town*, in the Colony, under the style or firm of *Pocock & Co.*

On the 8th of May, 1868, a Vessel, called the *Loch Awe*, bound from the port of *London* to the *Cape of Good Hope*, arrived in the port of *Cape Town*, having on board a general cargo of merchandise. As part of such general cargo there were laden on board of the Vessel the goods which the Appellant prayed should be declared forfeited, consisting of: 3,350 gross of Corks, twenty-five cases of Glassware, and three Carriages, namely, one Brougham, one Basket Carriage, and one Wire Sociable. The Carriages were packed in three separate cases, each containing one Carriage; and the three cases of Carriages, and twenty-five packages of Glassware were described by the marks and numbers of each package in a Bill of lading thereof, dated in *London*, 22nd of February, 1868, which was prepared under the directions of Respondent, *Pocock* (then in *England*), and signed by the Master of the Vessel. The three cases of Carriages and twenty-five cases of Glassware were also

described by their respective marks and numbers in the report of the Ship signed by the Master at the Custom House, *Cape Town*, in accordance with the Customs Regulations. The three cases of Carriages and twenty-five cases of Glassware were also described in a Policy of Insurance thereof effected by the Respondents with the *Commercial Marine and Fire Insurance Company*. There was no mention of Corks in any of the above three documents. The 3,350 gross of Corks were packed in the three cases containing the Carriages. Each of these three cases contained Corks, but it did not appear in what proportions the 3,350 gross were distributed among the three cases.

The Customs Regulations of the Colony require, that before any goods are unladen from any Ship, due entry shall have been made of such goods. The person entering any goods is required to deliver to the proper Officer of the Customs a Bill of the entry thereof, containing, amongst other things, the particulars of the quality and quantity of the goods, and the packages containing the same.

On the 8th of May, 1868, the *Loch Awe*, being then in the port of *Cape Town*, and ready to discharge her cargo, the Respondent, *Mathew*, made out the entry for the landing of the three cases of Carriages and twenty-five cases of Glassware. This entry the Respondent, *Mathew*, delivered to the Senior examining Officer in the Customs Department of the Colony, who passed it. *Mathew* produced to Mr. *Macaulay* two invoices, the one being the invoice of the Carriages, and the other the invoice of the Glassware. On the production of the invoices the goods were allowed to be landed, and two of the cases of Carriages were accordingly landed on the afternoon of the same day, under the directions of *Mathew*, and were conveyed to and placed in the business premises of the Respondents' Firm by people employed by the Respondents. On the following day, *Porter*, one of the examining Officers of the Customs of the Colony, acting upon information he had received, stopped the remaining Carriage case and twenty-five packages of Glassware, which had then been taken out of the Ship *Loch Awe* by people employed by the Respondents, and were on the landing-place preparatory to being conveyed to the Respondents' business

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premises. *Porter* sent for *Mathew*, and demanded his invoice. There was some discrepancy in the account given by *Porter* and the Respondent, *Mathew*, as to the reasons given by the latter for the non-production of the invoice. An invoice was produced after a short interval, and compared by *Porter* with the entry, with which it was found to agree. *Porter* proceeded forthwith to open the Carriage case in the presence of the Respondent, *Mathew*. When *Porter* was beginning to open the case, *Mathew* said: "You will find Corks in that case." He had not spoken of Corks before. *Porter*, finding Corks in the case (there being no mention of Corks in the entry), told *Mathew* to consider the goods as under seizure. *Porter* then proceeded to the Respondents' business premises, and examined the two other cases containing Carriages, which had been landed on the previous day. He found that both contained Corks, and at once seized the cases. On the discovery of Corks in the case first opened, *Mathew* said he would pass a post entry on the following Monday, as the Corks and the Carriages were separate consignments. *Porter* referred him to the Sub-Collector, and he went accordingly to the Sub-Collector, *Orpen*, and urgently entreated to be allowed to pass the Corks in a post entry, and said, in explanation of the omission to include the Corks in the original entry, that he had not done so because the Carriages were a consignment, but the Corks were the property of the Respondent, *Pocock*. *Orpen* told him he had better write a Letter on the subject, and he went away, and returned about half an hour afterwards with a Letter in his own handwriting, explaining that, for convenience of freight, the Carriage cases were filled up with Corks, which did not appear on the entry, as the Carriages were on consignment account, and the Corks to order for the Respondents' firm. *Mathew* again asked for permission to pass the Corks in a post entry. *Orpen* declined to give a definite answer until he saw the post entry, which at that time *Mathew* had not drawn up. On the Monday following *Mathew* went again to *Orpen*, and then produced a form of post entry relative to the Corks, but *Orpen* declined to give permission to pass them. All the goods in question, viz., the Carriages, the Glassware, and the Corks had been shipped in *England* on board the *Loch Awe* by the Respondent,

Pocock, who directed the packing of the Corks and the preparation of the Bill of lading before mentioned. *Pocock* sent the invoices of the Carriages and the twenty-five cases of Glassware to Mr. *J. R. Moore*, of *Cape Town*, and on the 7th of March, 1868, wrote from *London* a Letter to Mr. *Moore*, in which he mentioned that the cases were filled with Corks, which were to be sent to the firm of *Pocock & Co.*, and that *Mathew* would pay the duty on them. The Respondent, *Pocock*, also wrote to *Mathew* a Letter bearing the same date, informing him also on the subject. The Carriages were consigned to the Respondents' firm by a Carriage Maker in *England*. The twenty-five cases of Glassware were a joint venture between the Respondents' firm and a Warehouseman in *England*. The Corks were purchased by the Respondents from a firm of Cork Manufacturers in *London*. There was no evidence of a fraudulent intention to evade the Customs duties.

The Appellant then commenced the first of the actions against the Respondents in the Supreme Court. The declaration averred that the goods, namely, the three cases of Carriages, twenty-five cases of Glassware, and 3,350 gross of Corks, had been taken by the Respondents, who were the Importers thereof, by virtue of an entry in which the goods were not properly described, wherefore the entry ought to be deemed invalid, and the goods ought to be deemed goods taken without due entry thereof, and to be forfeited: and prayed a forfeiture of the goods under Ordinance No. 6 of 1853.

The Respondents pleaded to the declaration a plea denying all the allegations of fact and conclusions of law contained in the declaration.

On the 24th of August, 1868, the first action was tried before the Chief Justice, *Sydney Bell*, and Mr. Justice *Dwyer*, when the above evidence was adduced. The 24th, 25th, 32nd, and 50th sections of the *Cape of Good Hope* Ordinance No. 6, 1853, applicable to both actions, were relied on (1). Afterwards, on the 4th of

(1) These sections enact:—

"24. That no goods shall be laden or waterborne to be laden on board any ship or unladen from any ship in this Colony until due entry shall have been made of such goods, and warrants granted for the lading or unlading of the same; and that no goods shall be so laden or waterborne, or so unladen, except at some place at which an officer of Customs is appointed to attend the lading or unlading of goods, or

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September, 1868, the Court gave judgment for the Appellant, and decreed that the 3,350 gross of Corks and the three Carriages be forfeited as prayed, but that the twenty-five cases of Glassware were not forfeited.

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at some place for which a sufferance shall be granted by the Collector or other principal officer of Customs for the lading and unlading of such goods; and that no goods shall be so laden or unladen except in the presence or with the permission, in writing, of the proper officer: Provided always, that it shall be lawful for the Governor to make and appoint such other regulations for the carrying coastwise of any goods, or for the removing of any goods for shipment, as to him shall appear expedient, and that all goods laden, waterborne, or unladen contrary to the regulations of this Ordinance, or contrary to any regulations so made and appointed, shall be forfeited.

"25. That the person entering any goods shall deliver to the Collector or other proper officer of Customs a bill of the entry thereof, fairly written in words at length, containing the name of the exporter or importer, and of the ship and of the master, and of the place to or from which bound, and of the place within the port where the goods are to be laden or unladen, and the particulars of the quality and quantity of the goods and the packages containing the same, and the marks and numbers on the packages, and setting forth whether such goods be the produce of the *United Kingdom* or of the British Possessions, or not, and shall also deliver at the same time one or more duplicates of such bill, in which all sums and numbers may be expressed in figures; and the particulars to be contained in such Bill of entry shall be written and arranged in such form and manner, and the number of such duplicates shall be such as the Collector or other principal officer shall require, and such person shall, at the same time, pay down all duties due upon the goods, and the Collector or other proper officer of Customs shall thereupon grant their warrant for the lading or unlading of such goods."

"32. That no entry, nor any warrant for the landing of any goods, or for the taking of any goods out of any warehouse, shall be deemed valid, unless the particulars of the goods and packages in such entry shall correspond with the particulars of the goods and packages purporting to be the same in the report of the ship, or in the certificate or other document, where any is required, by which the importation or entry of such goods is authorized, nor unless the goods shall have been properly described in such entry by the denomination, and with the characters and circumstances according to which such goods are charged with duty, or may be imported; and any goods taken or delivered out of any ship, or out of any warehouse, by virtue of any entry or warrant not corresponding or agreeing in all such respects, or not properly describing the same, shall be deemed to be goods landed or taken without due entry thereof, and shall be forfeited."

"50. That all vessels, boats, carriages, and cattle made use of in the removal of any goods liable to forfeiture under this or any future Ordinance or Act of

From the judgment in the first action the Appellant appealed so far as it related to the twenty-five cases of Glassware.

In the second action by the Appellant against the Respondents, the declaration was founded on the 50th section of the Ordinance No. 6 of 1853 (1), and averred that the Respondents, or one of them, acting on behalf of both, did the following acts, viz., landed clandestinely the 3,350 gross of Corks without payment of duty thereon, and thereafter harboured and knowingly received into their possession the same goods: ordered, and through their Agents effected, the unshipping, landing, and removal of the goods: assisted, or were privy and concerned in the unshipping, landing, and removal of the goods: assisted, and were privy and concerned in the harbouring of the goods: and that the goods came into the hands of the Respondents, or one of them, with full knowledge that duty had not been paid thereon, and were liable to forfeiture under the before-mentioned Ordinance. The declaration further averred, that the Appellant elected to sue for the treble value of the goods in lieu of suing for the specific penalty provided by the Ordinance, and prayed that the Respondents might be declared to have jointly and severally forfeited the sum of £796. 6*s.* 9*d.*, being the treble value of the goods.

The Respondents, by their plea, denied all the allegations of fact and conclusions of law contained in the declaration.

The second action was tried on the 4th of September, 1868, before the same Judges as the first action. By consent, and with leave of the Court, the evidence in the first action was admitted

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the Legislature of this Colony, or under any Act of the Imperial Parliament relating to the Customs, or to trade and navigation, shall be forfeited; and every person who shall assist or be otherwise concerned in the unshipping, landing, or removal, or in the harbouring of such goods, or into whose hands or possession the same shall knowingly come, shall forfeit the treble value thereof, or the penalty of £100 at the election of the officers of the Customs, and the averment in any information or libel to be exhibited for the recovery of such penalty, that the officer proceeding has elected to sue for the sum mentioned in the information, shall be deemed sufficient proof of such election, without any other or further evidence of such fact, and that such officer shall be a competent witness in any such suit or proceeding."

(1) *Ante*, p. 350.

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as applicable to the second action, and the Court gave judgment for the Respondents, with costs.

From this judgment the Appellant also appealed. There was no cross-appeal.

The Respondents did not appear, the appeal was, therefore, heard *ex parte*.

Mr. *Mellish*, Q.C., and Mr. *H. Shield*, for the Appellant.

With respect to the first action, we contend, that, according to the true construction of the 32nd, 24th, and 25th sections of the *Cape of Good Hope* Ordinance, No. 6 of 1853, the twenty-five cases of Glassware ought to be deemed goods unladen without due entry thereof, and the judgment was wrong in not declaring the same forfeited, as well as the Corks and Carriages. The Bill of entry was indivisible, and constituted one entry, and being bad as to part of the goods was bad as to all. As regards the second action, the treble penalties claimed under the 50th section of the Customs Ordinance ought to have been adjudged. The Respondents having landed the Corks without having made an entry or paid the duty thereon, were liable to the penalties imposed by the 2nd clause of the 50th section. In *The Attorney-General* v. *Tomsett* (1) it was held, that the assistance or concern in the unshipment of goods liable to duty was to be considered to have taken place through the agency of the Master, and that the Master was properly charged, as having them in his possession, and it would make no difference even if *Mathew* did intend to make a subsequent entry or pay the duty. The Respondent, *Pocock*, was answerable for his Partner *Mathew's* acts. It was not necessary to shew a fraudulent intention; thus in *Reg.* v. *Woodrow* (2) a Dealer and retailer of Tobacco was held liable to the penalty imposed by Statute for having in his possession adulterated Tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so.

LORD CAIRNS:—

The first question raised by this appeal is, what goods were

(1) 2 Cr. M. & R. 170. (2) 15 M. & W. 404.

rendered liable to forfeiture to the Crown by reason of defective entry? That the Corks which are in question in the case were rendered liable to forfeiture is not disputed. It is contended by the Appellant, that not only were the Corks forfeited to the Crown, but that, in addition, the twenty-five cases of Glassware were forfeited; and, although the question has not been brought by any cross appeal before their Lordships, a suggestion has been made by the Chief Justice of the Supreme Court, to which in the first instance their Lordships will deem it their duty to advert, —a suggestion that the Court in the Colony has gone beyond what properly it ought to have done in declaring that the three Carriages in which the Corks were contained were also forfeited.

Their Lordships are of opinion—although, I repeat, the question has not been brought before them by any regular appeal upon this subject—that those Carriages were properly forfeited. Their Lordships consider that, under the 24th and 25th sections of the Colonial Ordinance, it is the duty of any person who applies to enter goods for the purpose of having them unladen, to state the packages the unlading of which he asks for, and to identify those packages; and then their Lordships consider, that it thereupon becomes further the duty of the person making this application to state the particulars of the quality and of the quantity of the goods which those packages, according to his knowledge, contain. If that statement is inaccurately made, their Lordships are of opinion, that there is, in that respect, a defective and improper entry, rendering the goods liable to forfeiture. In this case (confining the observation still to the question of the Carriages), there was a demand made for the entry and the unlading of three cases, having upon them particular marks; and, according to the construction which I have stated their Lordships put upon the section, it thereupon became the duty of the person tendering the entry to state what those three cases contained. He stated that they contained one Brougham, one Phaeton, and one Sociable, whereas, in point of fact, they contained those three Carriages and also a large quantity of Corks, filling up the empty spaces. Their Lordships are of opinion, that there is no ground for the doubt entertained

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by the Chief Justice, and that the judgment of the Court, in holding forfeited the whole of the contents of those packages, was a correct judgment.

But then arises the question brought before their Lordships directly by the appeal, whether the twenty-five cases of Glassware were also forfeited. That depends upon the construction which ought to be given to the word "entry" throughout the sections of the Ordinance which have been referred to. Their Lordships are of opinion, that it would not be a sound or proper construction to read the word "entry" throughout those clauses as meaning "Bill of entry;" because they are of opinion, that there may be several entries upon one Bill of entry. What shall be considered to be the different entries, if there be more than one upon one Bill of entry, will depend upon the facts of each particular case, the construction of the Bill of entry, and the nature of the goods which it describes. A case, for example, might easily be put, where fifty cases of goods precisely *ejusdem generis* were entered under one head, and as contained in cases marked from No. 1 to No. 50. It is obvious that that entry, although relating to fifty cases, would really be one entry.

But, in the present case, their Lordships think there can be no doubt, from the manner in which the entry has been tendered, that there are upon the Bill of entry two entries which are distinct for all substantial purposes; the first entry being that of the three Carriages in the three cases to which I have already referred, and the second being a separate entry of twenty-five cases of Glassware. With regard to those cases of Glassware, their Lordships cannot find any provision in the Ordinance which has been violated or departed from; and they are, therefore, of opinion, that there was a proper entry of those packages of Glassware, and that they were not liable to forfeiture, or rendered liable to forfeiture, by reason of being associated in the same Bill of entry with that other entry which their Lordships consider was a defective entry.

The result is, that on the first part of the case their Lordships consider the judgment of the Court below is correct, and ought not to be altered.

The second part of the appeal raises the question, whether the Respondents, or either of them, has become liable to the treble value of the forfeited goods?

I may put out of the case the first Respondent, *Pocock*, for it was admitted that there was no case of personal culpability against him. The question only arises with regard to the Respondent *Mathew*. As regards the facts of the case, resulting from the oral evidence, their Lordships have no hesitation in saying that, in their opinion, that evidence shews that *Mathew* was a person directly concerned in, if he was not the person ordering and entirely responsible for, the unshipping, the landing, and the removal of the goods which they hold to be liable to forfeiture. Their Lordships, therefore, see no reason for the opinion entertained by the Court below that the only terms in the Ordinance under which *Mathew* can be brought would be the words relating to the harbouring of goods. They are of opinion, that he was a person either unshipping, landing, and removing the goods, or a person concerned in the unshipping, landing, and removing of the goods.

Their Lordships are of opinion, further, that it is not made an element in the 50th clause of the Ordinance that the Defendant should be a person unshipping, landing, and removing the goods with the fraudulent intent of depriving the Government of the duty properly payable upon their goods. The question of fact is all that the clause requires to be determined,—Was the Respondent, *Mathew*, or was he not, a person who was actually concerned in unlading and unshipping the goods liable to forfeiture? Their Lordships are also of opinion, that it is not any answer to the charge under this section to say, that the Respondent, *Mathew*, was the Owner of the goods, and therefore, as it were, the principal concerned, and not an accessory. The proceeding under the first part of the record was not a proceeding personally against any individual. It is a proceeding for the forfeiture of particular goods, and the question who is the Owner of the goods under that part of the proceeding is immaterial. The goods having been forfeited by a proceeding which is in the nature of a proceeding *in rem*, the question who is liable to penalties for being concerned in the landing or the unlading of the goods is a question to be deter-

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mined irrespective of the inquiry, who is the principal and who is the accessory?

Their Lordships consider that, upon the facts appearing on the evidence, it is abundantly clear that the Respondent, *Mathew*, was aware before these goods were unshipped, and at the time he tendered the entry, that the cases contained the Corks, and that he was aware when he was concerned in unshipping them that he was unshipping cases of goods containing certain goods as to which no mention had been made upon the Bill of entry.

Therefore, their Lordships are clearly of opinion, that all the elements of the offence created by the 50th section concur in the case of *Mathew*, and that he has become liable to the penalty of the treble value of the goods under that section. They will, therefore, humbly advise Her Majesty that the appeal in that respect should be allowed, and that judgment should be given for the Crown, in the proper form, for the treble value of the goods forfeited.

Solicitor for the Appellant: *Thomas C. Allin.*

THE REV. CHARLES VOYSEY, CLERK . . APPELLANT;

AND

THOMAS SHEPHERD NOBLE . . . . . RESPONDENT.

AND IN THE PRINCIPAL CAUSE RETAINED

THOMAS SHEPHERD NOBLE . . . . . PLAINTIFF;

AND

THE REV. CHARLES VOYSEY . . . . . DEFENDANT.

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1870
Nov. 10, 14, 15.
1871
Feb. 11.

4 Ad. & E. 113. 7
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8 P.D. 95-8

ON APPEAL FROM THE CHANCERY COURT OF YORK.

Ecclesiastical Law—Beneficed Clerk in Orders—Admission of Articles of Charge—Appeal—Practice—Retention of suit by appellate Tribunal—Charge of Heresy in maintaining and publishing Doctrines contrary to the Thirty-nine Articles of Religion—Rules of Judicial Exposition with reference to the Articles and Formularies of the Church—Specified Offences in incriminated passages—Sentence of deprivation.

In charges against a Clergyman for maintaining and promulgating doctrines contrary to, and inconsistent with, divers of the Thirty-nine Articles of Religion, the Judicial Committee is not compelled, as in cases affecting the right to property, to affix a definite meaning to any given Article, where such Article is really a subject of dubious interpretation. It is, however, very different where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them. It is not requisite in such case that the contradiction of the Articles should be a contradiction *totidem verbis;* it is sufficient if the opinions published, or promulgated, be repugnant to, or inconsistent with, their clear construction.

It is not competent for any Clergyman, of his own mere will, not founding himself upon any critical inquiry, but simply upon his own taste and judgment, to assert that whole passages of some of the Canonical Books are without any authority whatever, as being contrary to the teaching of Christ as contained in others of the Canonical Books.

Articles of Charge against a Clerk in Holy Orders and Incumbent of a Vicarage and Parish Church, for an Offence against the Laws Ecclesiastical of the Realm, in having printed, published, and set forth certain volumes of Sermons, in which he advisedly maintained and affirmed doctrines directly contrary or repugnant to, and inconsistent with, divers of the Thirty-nine Articles of

* *Present*:—THE ARCHBISHOP OF CANTERBURY, THE LORD CHANCELLOR (LORD HATHERLEY), LORD CHELMSFORD, and SIR ROBERT PHILLIMORE (DEAN OF THE ARCHES).

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Religion and Formularies of the Church of *England*, the alleged errors being—(1) Concerning the reconciliation of God to man by the sacrifice or propitiation of Our Lord Jesus Christ, and as to the necessity of such reconciliation; (2) As to the Incarnate Godhead of Our Lord, and the doctrine of the Holy Trinity; (3) As to the authority of the Scriptures or Holy Writ: —admitted and sustained. Such several errors and doctrines so charged to have been maintained and affirmed, *held* sufficiently proved by the incriminated passages extracted from the said Sermons, and set forth in the Articles of Charge, as being respectively repugnant to, and inconsistent with, the several Articles of Religion to which they were pleaded as contrary to and opposed, without reference to the Formularies of the Church to which they were also pleaded to be repugnant and inconsistent: and sentence of deprivation of all Ecclesiastical promotion, especially the Vicarage of which he was Incumbent, pronounced against such Clerk, unless within a week from the delivery of the judgment, he should expressly and unreservedly retract the several errors in which he had so offended, and which he refused to do.

THIS case came before the Judicial Committee on an appeal from an Interlocutory Sentence of the Official Principal of the Chancery Court of *York*, pronounced on the 2nd of December, 1869, in a cause of the office of Judge promoted by *Thomas Shepherd Noble*, of the city of *York*, against the Rev. *Charles Voysey*, Clerk, Vicar of *Healaugh*, in the county, diocese, and province of *York*.

On the 14th of June, 1869, the Bishop of *London* issued a Commission to certain Commissioners therein named, whereby, after reciting that the Rev. *Charles Voysey* had been charged by the said *T. S. Noble* with an offence against the laws Ecclesiastical of the Realm, committed within the diocese of *London*, such alleged offence being that he had, within two years then last past, printed, published, or set forth certain volumes, or parts of volumes, of a Work, entitled "*The Sling and the Stone*," being Vol. II., Pts. 1 to 12, for 1867; Vol. III. for 1868; and Vol. IV., Pt. 2, for 1869, in each of which volumes or parts he had advisedly maintained, and affirmed, and promulgated doctrines directly contrary, or repugnant to and inconsistent with, divers of the Thirty-nine Articles of Religion, and the formularies of the United Church of *England* and *Ireland*; and after reciting that in the said volumes or parts of the said work there were contained certain passages thereinafter set forth, as well as other passages in respect of which the charge had been made, the Bishop enjoined and empowered the said Commissioners, or any three of them, to make inquiry as to the ground of the charge made by the said *T. S. Noble* against the said

Rev. *C. Voysey*, and further to proceed thereupon in regard to the premises, and in execution of the Commission in pursuance of the Act, 3 & 4 Vict. c. 86, being an Act "for better enforcing Church discipline;" and in manner therein authorized and directed.

By a report under their hands and seals, dated the 10th of July, 1869, the Commissioners reported to the Bishop of *London* their opinion, that there was sufficient *primâ facie* ground for instituting further proceedings against the Rev. *C. Voysey* for having, on the 31st of May then last, committed an offence against the laws Ecclesiastical within the diocese of *London*, as charged by Mr. *T. S. Noble*.

By Letters of Request, dated 23rd July, 1869, the Archbishop of *York*, after reciting, among other things, that the Rev. *C. Voysey* had been charged with an offence against the laws Ecclesiastical committed in the diocese of *London* (as in the said Commission stated and set forth), requested *Granville Harcourt Vernon*, Esq., M.A., Official Principal of the Chancery Court of *York*, to issue a citation or decree under the seal of the Court, citing the Rev. *C. Voysey* to appear and answer to certain articles touching his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially touching his having committed an offence against the laws Ecclesiastical (as before stated), and touching and concerning the scandal and evil report existing concerning him, as having offended against the said laws as aforesaid; the said articles, heads, positions, or interrogatories to be administered to the said Rev. *C. Voysey* at the voluntary promotion of the said *Thomas Shepherd Noble;* and finally, to hear and determine the cause according to the law and practice of the Court.

On the 28th of July, 1869, a Citation was accordingly issued from the Chancery Court of *York*, whereby the said Rev. *C. Voysey* was cited to appear and answer certain Articles, &c., to be administered to him at the voluntary promotion of *T. S. Noble*, he having offended against the laws Ecclesiastical in the particulars set forth in such Letters of Request.

The Articles thus exhibited were thirty-eight in number, and set forth at great length passages extracted from the several volumes and parts of the Appellant's books, which volumes were brought in with the Articles, and made exhibits in the cause.

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The doctrines, positions, and opinions, as contrary or repugnant to, or inconsistent with, any of the doctrines of the Church as contained in the Thirty-nine Articles of Religion and the Book of Common Prayer, which he was charged to have maintained or affirmed in these inculpated passages, were—First, "that Christ has not made an atonement or reconciliation for sin, and has not been made a sacrifice to reconcile the Father to us." Second, "that there is no need of any atonement or sacrifice, nor any place for such in the purpose of God." Third, "that Christ did not bear the punishment due to our sins, nor suffer in our stead, and for us, and that to think that He did, or that it was necessary He should so suffer, is infinitely erroneous, and dishonouring to God, and is the most revolting of all the popular beliefs." Fourth, "that mankind are not by nature born in sin and the children of God's wrath, and are not separated from God by sin and under his wrath, or under a curse: and that they are not in danger of endless suffering, nor is there any curse to remove by the shedding of the innocent blood of Christ: and that the doctrine of the fall of man is contrary to the teaching of Jesus Christ." Fifth, "that mankind need no atonement or justification, that salvation is not through justification, and that the doctrine of justification by Faith is contrary to the teaching of Jesus Christ." Sixth, "that our Lord Jesus Christ is no more very God of very God, begotten not made, than we men are." Seventh, "that the worship of Christ is idolatry, and is inconsistent with the worship of the true God, and that it is an instance of holding up our hands to a strange God, and outrivals the worship of the One true God, and draws away our highest homage and affection from God, to another." Eighth, "that the very idea of the incarnation of the Son of God takes its rise in unbelief, and springs out of absolute infidelity." Ninth, "that the expected return of Christ to judge the world takes its rise in unbelief, and springs only out of absolute infidelity; and that such expectation is unreasonable, is opposed to the simplicity of the love of God as a Father, and is calculated to overthrow the moral government of God." Tenth, "that the worship of the Father, Son and Holy Ghost is the worship of three Gods, and that the worship of the Son and Holy Ghost is idolatry, and that the belief of the Godhead of the Son and Holy Ghost, as

expressed in the Nicene Creed, weakens and disguises the belief in One God the Father, and obliterates the true name of God." Eleventh, "that revelation of the knowledge of God by means of any book is impossible; that all true knowledge of God comes directly from the law of God written in men's hearts; that all knowledge of God comes only from men's own sense of what He requires them to do, and that the only true revelation possible by God to man is through the sense of God's presence, and is originated in the heart of man, independently of God's written word." Twelfth, "that in God's Word written, Holy Scripture and Holy Writ, there are found manifest, palpable, and irreconcilable contradictions, and many places which cannot be expounded but so that they be repugnant to others." Thirteen, "that the authority of the Gospel according to St. John is doubtful, and that the said Gospel ought not to be applied to establish any doctrine, and that whole chapters of the said Gospel are crowded with passages which represent Jesus Christ as speaking words which he never could have spoken; and which, if spoken, would not have been believed." Fourteen, "that the said Gospel according to St. John contains passages which can only be expounded so that they be repugnant to each other, or to other places of God's Word written, or Holy Scripture; and that the character of our Lord Jesus Christ, as set forth in the said Gospel, is quite irreconcilable with the idea of his being a true teacher sent from God, and is entirely different from the character of the Christ of the other three Gospels." The particular Articles of Religion and the parts of the Prayer Book and Homilies, which these doctrines and opinions maintained, promulgated, and published by Mr. *Voysey*, were charged to be severally contrary and opposed to, were pleaded and set forth at length in the Articles of Charge; and will be found referred to in the statement of the arguments, and in the ultimate judgment of the case.

Mr. *Voysey*, the Defendant in the cause, having duly appeared by proxy in the Chancery Court of *York*, Mr. *Noble*, the Promoter of the suit, prayed that the Articles and Exhibits might be admitted. Mr. *Voysey's* proxy praying that the same might be rejected.

Counsel were heard on the part of the Promoter, and the Defendant, without revoking his proxy, by leave of the Court, was heard in person, and moved the rejection of the Articles, on the

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ground, amongst others, that they disclosed no Ecclesiastical offence. He also moved that they might be reformed by omission of all reference which they might contain to authorities not in reality dogmatic, and in particular by the omission of all references to the Homilies, and by the omission of all charges which were not laid before the Commission of the Bishop of *London*, or not contained in the Letters of Request or Citation.

On the 29th of December, 1869, the Official Principal and Chancellor of the Chancery Court of *York*, by his Interlocutory Decree, admitted the Articles and Exhibits, as prayed by the Promoter in the Suit, and condemned the Defendant in the costs. The Defendant prayed for and obtained leave to appeal to Her Majesty in Council.

The proceedings in the Court below, together with the Articles as admitted, having been brought in, and printed cases on behalf of the Defendant, as Appellant, and of the Promoter, as Respondent, the appeal came on for hearing.

The Appellant, the Rev. Mr. *Voysey*, appeared in person, and as in the case brought in by him, he argued and asked that the Interlocutory sentence of the Official Principal of the Chancery Court of *York* might be reversed, and that the Articles exhibited against him might be rejected, as not disclosing any offence committed by him against Ecclesiastical law. He prayed further, that the Articles, if not rejected, might be reformed; in particular by amending the statements of the doctrines, positions, and opinions imputed to him, as being calculated to embarrass and prejudice; and by so stating such doctrines as to shew that each was necessarily and in terms contrary to the plain and legal sense of the Article of Religion to or to which it was said to be contrary, repugnant, or inconsistent. Insisting, that it did not appear from the passages cited in the Articles of Charge, or from any of them, that he had maintained, affirmed, or promulgated, the doctrines, positions, or opinions respectively imputed to him, or any of them, in respect of the passages cited and set forth. And he further prayed, that the Articles might be reformed or amended by striking out all such passages, and all charges in respect of alleged doctrines, repugnant to or inconsistent, as well with the Articles of Religion, as those parts of the Book of Common Prayer to which they were

alleged to be contrary or repugnant: the Appellant contending, that the doctrines or opinions imputed to him were not contrary to such Articles, or such parts of the Book of Common Prayer to or with which they were alleged to be contrary; and he insisted that the maintaining, affirming, and promulgating doctrines and opinions contrary to or inconsistent with the passages set forth or referred to in parts of the Book of Common Prayer, other than the Articles of Religion, or other than such of them as are by law made a test of doctrine, was not an offence that could be charged against him in that suit. He prayed that all references to, or quotations from, the Book of Homilies might be struck out; insisting that the passages cited from the Homilies could not lawfully be cited in that suit as tests of doctrine; and he prayed that the Articles might be further reformed by omitting all mention of doctrines, positions, or opinions, which were not charged or set forth or referred to in the Letters of Request and Citation, or referred to in the Commission of the Bishop of *London*, or the Reports of the Commissioners thereon. He, moreover, contended that the doctrines and opinions imputed to him were set forth indistinctly and ambiguously, and in a manner calculated to embarrass and prejudice him; and that each of the doctrines and opinions imputed to him ought to have been stated in such terms, as to shew that it is necessarily and in terms contrary to the plain and legal sense of the Articles of Religion to which it was alleged to be contrary. The Appellant admitted that he had published the volumes from whence the passages contained in the Articles were extracted, and was himself the author of those passages, but he maintained that they did not bear the interpretation put on them as alleged by the Articles, and insisted that they did not contradict any of the doctrines of the Church contained in the Articles of Religion.

The *Solicitor General* (Sir *John Duke Coleridge*), Sir *R. Palmer*, Q.C., Mr. *Archibald*, and Mr. *Cowie*, appeared for the Respondent, the Promoter of the suit.

THE LORD CHANCELLOR:—

Their Lordships do not deem it necessary to call on the Respondent's Counsel. They have given full attention to the Appellant's

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argument; and have carefully considered the several Articles which have been admitted by the Official Principal of the Chancery Court of *York*, and they are of opinion that, with the exception of the 13th Article, they are all admissible. That Article charges the Appellant with maintaining "That the commonly received doctrines of Intercession and Mediation by Christ, and Atonement or reconciliation to God by the death of Christ, are all opposed to the perfect harmony and simplicity of the love of God, and of the teaching of Jesus Christ himself," in contravention of the 2nd, 7th, and 31st Articles of Religion and the Book of Common Prayer. Their Lordships think that "the commonly received doctrine" is too vague a description of the great doctrine alleged to be contravened, and that the Article in that respect is not sufficiently specific. They gather from the Respondent's Counsel that they are willing that that Article should be altogether omitted, and do not desire it to be reformed; and with the exception, therefore, of that Article, their Lordships agree with the Official Principal and Chancellor of the Chancery Court of *York*, and affirm his decree. In admitting the Articles as pleaded, their Lordships are however anxious that the effect of their decision should not be misunderstood. It amounts to this, that in their Lordships' judgment the passages extracted from the works of the Defendant Mr. *Voysey*, and set forth in the several Articles of charge, are *primâ facie* at variance or inconsistent with the law, as contained in the Articles and Formularies of the Church which they are specifically alleged to contravene. It will be competent for the Defendant to remove this *primâ facie* impression, either by proving that the passages articled do not bear the meaning ascribed to them by the Promoter of the Suit, or are not, as alleged, against the law and teaching of the Church. For this purpose, Mr. *Voysey* may have recourse to the whole scope and tenor of the works from which the passages are taken, or he may shew that if the meaning ascribed to them be correct, yet that they do not exceed the limits of criticism and interpretation which the law permits. He may refer, as has been allowed in former cases of this description, to eminent Divines who have written on the subjects which form the matter of charge in these Articles. If, however, he thinks fit, he may formally contravene the Articles by pleading new matter

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and then it will not be until the pleadings have been completed, and the whole case heard, first in the Court below, and then if it should come by appeal to this Court, that their Lordships would be in a condition to form a final judgment on the merits. But their Lordships have been earnestly requested by both the Appellant and Respondent to retain the principal Cause, and proceed to the hearing without remitting it to the Court below. This they have authority to do under the Statutes constituting this Tribunal, the 2 & 3 Will. 4, c. 92, 3 & 4 Will. 4, c. 41, and the 6 & 7 Vict. c. 38, by which all the authority which could have been exercised by the Court of Delegates is vested in the Judicial Committee, except the power of giving final Sentence. That power can only be exercised in cases like the present by Her Majesty's Order in Council, made upon the report and recommendation of this Committee. The appeal having been duly referred to us, the principal cause out of which it arises is in our jurisdiction; and as we understand the parties are desirous that we should hear it, their Lordships, under the peculiar circumstances of this case, and without establishing a precedent, are willing to proceed with the cause as an original Cause, and upon the completion of the pleadings and proofs, to continue the hearing as in the Court below.

Upon this intimation and judgment of their Lordships, the pleadings were immediately amended by the withdrawal of the 13th Article, and the Exhibits annexed having been admitted in the Court below, were brought in, and the Cause being thus ripe for hearing, was proceeded with.

Nov. 14.

Sir *R. Palmer*: —

Your Lordships, in the exercise of the authority given you by the Statutes under which this Tribunal is constituted, in accordance with the ancient practice of the High Court of Delegates, whose jurisdiction and authority you possess, having consented to retain this Cause, and the Articles as reformed having been admitted, it becomes the duty of the Counsel for the Promoter to proceed with the Cause as an original Cause, in the same manner as it would have been proceeded with in the Chancery Court of *York*, in which it was first instituted. The Defendant, then, being a Priest

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in Holy Orders of the United Church of *England* and *Ireland*, and a beneficed Clergyman, is charged with printing and publishing certain works or books which are, in fact, a series of Sermons preached by him in the Parish Church of *Healaugh*, of which he is Vicar, wherein he has maintained and affirmed doctrines contrary or repugnant to the Articles of Religion, and the Formularies of the Church. The offence charged is, by the Statute, 13 Eliz. c. 12, a criminal offence, the sentence, if the Defendant is convicted, being, by the 2nd section of that Act, the deprivation of his benefice. Mr. *Voysey*, in compliance as well with the Statute as the Canon Law, has, both upon his ordination as Deacon and Priest, and before his induction to his preferment, solemnly subscribed to all the Articles of Religion, and declared his assent thereto. He has also, in compliance with the provisions of the *Act of Uniformity*, 13 & 14 Car. 2, c. 4, s. 6, in the form there prescribed—the Act being, as to that matter, in force in 1864 at the time of his institution—solemnly and publicly declared his assent and consent to all and everything contained and prescribed in and by the Book of Common Prayer. He admits the publication of the Sermons from which the passages in the Articles exhibited against him are taken, and avows and maintains the doctrines and opinions he has there preached and printed; and it is certainly difficult, allowing every possible latitude of opinion that is consistent with a liberal and even a free interpretation of the Articles, the Creeds, and Formularies of the Church, to understand how a Clergyman professing and promulgating such doctrines as Mr. *Voysey* avows, can think himself justified in continuing a member of a Church he so widely dissents from, or in retaining the preferment which he holds solely as a Minister of that Church. But he is here to defend himself, and it is only my duty to point out and prove the charges made against him. The Articles of Religion must be construed with the Formularies of the Church. This was held by the Dean of the Arches in the *Gorham Case* when before him, and was not impeached or overruled when that case came on appeal before this Tribunal (1). This position requires no argument, since all the doctrines affirmed in the Articles of the Church are maintained and enforced in her formularies and services. Now, the Articles of

(1) Moore's Special Report, pp. 168–9.

Charge against Mr. *Voysey* contain at great length the passages in his works which contravene and are repugnant to the Articles of Religion and the Formularies of the Church set forth in the Book of Common Prayer. The first series of these incriminated passages are pleaded in the 7th, 8th, and 9th Articles of Charge (1), and are at direct variance with the Church's doctrine and teaching of the Atonement or Reconciliation and sacrifice for sin made by our Blessed Lord; contrary to the doctrine contained in the 2nd Article of Religion, "Of the Word or Son of God, which was made very Man," wherein it is expressly declared that Christ "truly suffered, was crucified, dead and buried, to reconcile his Father to us, and to be a Sacrifice, not only for original Guilt, but also for all actual Sins of Men;" contrary also to the 15th Article, "Of Christ alone without Sin," wherein it is declared that "He came to be the Lamb without spot, who, by sacrifice of Himself once made, should take away the sins of the World;" and contrary also to the 31st Article, "Of the one Oblation of Christ finished upon the Cross," which declares that "The Offering of Christ once made is that perfect Redemption, Propitiation, and Satisfaction for all the sins of the whole World, both Original and Actual."

Mr. *Voysey's* doctrine is contrary also to the Formularies of the Church set forth in various parts of the Book of Common Prayer, and especially in the Collect for the second Sunday after Easter, the second Collect for Good Friday, the Collect for the first Sunday after Easter, the Commination Service, the Litany, the Order of the Visitation of the Sick, the Order of the Administration of the Holy Communion, especially the exhortations therein; and the sentences taken from the Gospels of St. Matthew and St. John, and the Epistles of St. Paul and St. John, the preface for Easter Day, the Prayer of Consecration, and the first and second prayers after Communion in the same Order. The doctrines contained in the passages set forth in these Articles of Charge are, moreover,

(1) These, as well as all the other incriminated passages, were read by the learned Counsel, as well as the several Articles of Religion and Formularies to which they were opposed. The great length of these extracts precludes their being set forth here; a reference to the doctrines they contravened is deemed sufficient, as the judgment of their Lordships will be found to contain all those passages which were held sufficient to sustain the charges against Mr. *Voysey*, and upon which that judgment was founded.

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against the doctrine of the Atonement and the exposition thereof professed and taught in the Book of the Homilies of the Church, especially in that part entitled "The Second Part of the Sermon of the Misery of Man," and in that part of the First Book of Homilies, entitled "A Sermon of the Salvation of Mankind by only Christ our Saviour from Sin and Death Everlasting;" and also in that part of the same Book of Homilies, entitled "A Short Declaration of the true, lively, and Christian Faith." The authority of the Book of Homilies with reference to the Articles and Formularies of the Church is expressly pleaded in the 35th Article of Charge, which states "That the doctrines, positions, and teachings of and contained in the said Articles of Religion, and portions respectively of the Book of Common Prayer and Formularies, are more largely expressed in the godly and wholesome doctrine necessary for these times contained in the First Book of Homilies in the second part of the Sermon of the knowledge of Holy Scripture."

That the Homilies, so far as they go, are just expositions of the doctrines and teaching of the Church there can be no doubt; they are ordered by the rubric after the Nicene Creed to be read when there is no Sermon. The doctrine of Original Sin declared by the 2nd and 9th of the Articles of Religion is impugned and denied by the Defendant in the passages extracted from his Sermons, and set forth in Articles 15 and 16 of the Charge. The doctrine of justification as declared by the 11th Article of Religion, and taught in the Church Catechism, and in the Order for the Ministration of Baptism in the Book of Common Prayer, and more fully expressed in the First Book of Homilies, the "Second Part of the Sermon of The Misery of Man," and the "First Part of The Sermon of Salvation," which is the Homily on justification referred to in the 11th Article of Religion, the Second Book of the Homilies, of the Homily of "The Passion of Christ," is impugned and controvened in the passages contained in the same 15th and 16th Articles of Charge.

The 20th and 21st Articles of Charge contain passages wherein the Defendant affirms that our Lord Jesus Christ is not very God of very God; that the worship of Christ is idolatry; that the idea of incarnation, and of the expected return of Christ to judge the

world, takes its rise in unbelief; that the worship of the Father, Son, and Holy Ghost, is the worship of three Gods, and that the worship of the Son and Holy Ghost is idolatry; all which opinions and declarations are directly contrary to the Holy Scripture, and to the doctrines and teaching of the Church as declared in the Articles of Religion, especially the 1st Article of Religion, "Of Faith in the Holy Trinity," which declares that in the Unity of the Godhead "there be three Persons, of one substance, power, and eternity; the Father, the Son, and the Holy Ghost;" in the 2nd Article of Religion already referred to; in the 4th Article of Religion, "Of the Resurrection of Christ;" and in the 5th Article of Religion, "Of the Holy Ghost." The doctrines affirmed by Mr. *Voysey* in the passages extracted in the 20th and 21st Articles of Charge, are contrary, also, to the formularies of the Church contained in her liturgies and services throughout the Book of Common Prayer: instances and examples of which are pleaded and given at great length in the 28th Article of Charge in answer to the passages extracted from Mr. *Voysey's* publications and writings.

The 29th and 30th of the Articles of Charge contain further copious extracts from the Defendant's works, wherein and whereby he depraves in general Holy Scripture, and especially the Gospel of St. John, contrary and diametrically opposed to the doctrine and belief of the Church as declared and set forth in the 6th Article of Religion, "Of the Sufficiency of the Holy Scriptures for Salvation,"—which, besides enumerating the various Books called the Canonical Books, and which we know as the Bible without the Apocrypha, "of whose authority," it declares, "was never any doubt in the Church;" adds, "all the Books of the New Testament, as they are commonly received, we do receive, and account them Canonical;" and the 20th Article, "Of the Authority of the Church." Mr. *Voysey's* declarations and opinions on these subjects are equally against the Formularies of the Church contained in the Book of Common Prayer, especially the Creeds, the Collects for the Second Sunday in Advent, for St. Mark's Day, for St. John the Evangelist's Day, the Order for the Administration of the Lord's Supper, the Form and Manner of making Deacons and Priests, the Book of Homilies (B. L. Pt. 2), and the Homily there set forth for Whit Sunday. These authorities,

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which the Defendant is specifically and expressly charged to impugn and violate, are quite conclusive, as we maintain, to convict him of the charges made against him, on account of his teaching and publications; and unless he shall be advised, as we trust he may yet be, of his error, we submit that he is within the penalties imposed by the Statute of *Elizabeth*, and, as well for his own freedom as for the sake of the Church, he must and ought to be deprived of his preferment.

Mr. *Voysey*, who was now the Defendant in the principal Cause, appeared, as before, in person, and proceeded with an address, some portion of which he had read previously as his argument on the appeal against the admission of the Articles. The Defendant by this stated that he proposed to argue in his own defence the entire groundlessness of the charges brought against him, by shewing:—(1) That not one incriminated passage of all those cited from his books contradicted any statement of the Articles or Creeds in their plain literal sense; (2) That what he had contradicted were popular glosses upon the Articles, not parts of the Articles themselves, and for this purpose he proposed (3) to cite instances from the writings of celebrated Divines of unimpeachable orthodoxy, in which they have stated views more or less in accordance with his own, and at variance with what he termed the popular glosses upon the Articles and Creeds which he was being prosecuted for contradicting; (4) and he proposed to shew that not one of the incriminated passages cited from his Sermons in the Articles of Charge contradicted the Articles of Religion in their plain and literal sense. He disclaimed the intention of contradicting the Articles; and urged that the Promoter ought to bring in juxtaposition a single statement of his with another statement from the legal Formularies as an instance of direct contradiction, which he maintained they had not done. Taking the Articles of Charge against him in groups, and commencing with the doctrine of the Atonement, he maintained that he had not contravened the 2nd, 3rd, 15th, and 31st Articles of Religion by maintaining "that Christ has not made an atonement or reconciliation for sin, and has not been made a sacrifice to reconcile his Father to us," as alleged by the 10th Article of Charge—a charge

which, he admitted, alleged on his part a distinct contradiction of the Articles of Religion, which could not be allowed to a clergyman of the Church of *England*. He asserted that the charge was false, that he never had affirmed that "Christ has not made an atonement for sin," or "has not been made a sacrifice to reconcile the Father to us;" that he had taught that "in one sense Christ was indeed a sacrifice," and "sin caused his death; that he had all along intended to disprove, deny, overthrow, or undermine certain popular theories of the relation between God and Man, and at the same time had been studious to avoid using language at variance with the Articles; that if condemned for his language on this point, it would be not for controvening the Articles of Religion in their plain literal sense, but for controvening what he termed certain popular theories which are not essential portions of the Articles and Creeds; and for doing so in language framed to attack those theories, and to avoid collision with the Articles and Creeds. He urged that in bringing his statements into comparison with the Articles, strict justice required that the *ipsissima verba* only should be taken in their literal sense, and not any inferences which might be drawn from them. As an example he said he had denied the *necessity* for our reconciliation with God by the death of an innocent; but he had nowhere denied that the death of Christ reconciled the Father to us. The denial of the *necessity* of "reconciliation," in the sense in which that term was popularly understood, was a denial of something not in the Articles, which nowhere affirmed the necessity, only the fact. It was the necessity, in the popular sense, against which he was contending. To the 11th Article of Charge he admitted that he had affirmed, as charged, "that there is no need of any atonement or sacrifice;" but replied that the Articles nowhere affirm the contrary; and to the second part of the charge, "that there is no place for atonement or sacrifice in the purpose of God," he had never used that expression, though there was no assertion to the contrary in the Articles of religion. To the charge contained in the 12th Article of Charge, that he had maintained "that Christ did not bear the punishment due to our sins, nor suffer in our stead and for us; and that to think that He did, or that it was necessary that He should so suffer is infinitely erroneous and dishonouring to God, and is the

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most revolting of all the popular beliefs," he replied that he had affirmed that Christ did not bear the punishment due to our sins, but that not one of the Articles of Religion affirmed that He did. He maintained that what he had denied regarding the mediation of Christ and atonement or reconciliation to God by the death of Christ, was not what the Articles of Religion affirm, but certain glosses put upon them, or inferences drawn from them, for which the Articles are not responsible; and after giving what in his view was a summary of the "commonly received doctrines" on this point, he cited passages from the Homilies, especially those for Good Friday, which he maintained contained those doctrines which were nowhere to be found in the Articles of Religion, and which were the doctrines he denounced. With regard to the 17th Article, respecting the Doctrine of Original Sin, which charged him with maintaining: (1) That mankind are not by nature born in sin; (2) and the children of God's wrath; (3) and are not separated from God by sin; (4) and under His wrath; (5) or under a curse; (6) and that they are not in danger of endless suffering; (7) nor is there any curse to remove by shedding of the innocent blood of Christ; (8) and that the doctrine of the fall of man is contrary to the teaching of Jesus Christ; dividing the charge into the above eight propositions, he denied having anywhere affirmed the first; having, on the contrary, repeatedly affirmed that we are all born with a natural tendency to do as we like instead of obeying God's laws. Neither had he affirmed the eighth proposition. What he did affirm was that the "commonly received doctrine" about the Fall was never taught by Christ, and is totally at variance with his teaching; and he maintained that there was not a word in the four Gospels, or in the Articles and Creeds, to prove the contrary. The remaining six propositions, subject to his own definition of what was meant by the word "curse," which he defined to be God's wrath occasioned by a certain sinful tendency or disposition in us, which brings down on us His anger, he admitted were truly charged, but maintained they were not heretical, and he relied on a passage in the judgment in *Williams* v. *The Bishop of Salisbury* and *Wilson* v. *Fendall* (1): "We do not find in the Formularies (referred to in the

(1) 2 Moore's P. C. Cases (N.S.) 433. 10 Jur. Rs. 462.

Article of Charge then under consideration) any such distinct declaration of our Church upon the subject (the eternity of final punishment) as to require us to condemn as penal the expression of hope, by a Clergyman, that even the ultimate pardon of the wicked, who are condemned at the day of judgment, may be consistent with the will of Almighty God." As to the 18th Article of Charge, that he had maintained: (1) "That mankind need no atonement or justification"; (2) "That salvation is not through justification"; and (3) "That the doctrine of justification by faith is contrary to the teaching of Christ;" he admitted the fact, and repeated, "That we do not need atonement or justification;" no Article affirming that we do. He denied having affirmed the second proposition; and with regard to the third, he had said that the doctrine of justification by faith was never taught by Christ, but he had not said that this doctrine was contrary to Christ's teaching, and he referred to one of his Sermons in the volumes before the Court, wherein he had spoken of the doctrine of justification by faith as preached by St. Paul; and to the 11th Article of Religion, by which it is described as a most wholesome doctrine. Passing to the third group of charges contained in the 23rd, 24th, 25th, 26th, and 27th Articles, he observed that in Art. 23 he was charged with having affirmed that "Our Lord Jesus Christ is no more very God of very God, begotten not made, than we men are," contrary, as there alleged, to the 1st, 2nd, 4th, and 8th Articles of Religion. He denied that the words charged were his, and read extracts from his Sermon on Anthropomorphism to shew what his meaning was in the incriminated passages, admitting that therein he affirmed "That we men are born of God ('regenerate' as the Church expresses it) very God of very God, begotten not made. That is as true of us as it is true of Christ, and that the Scriptures themselves, especially some words of Christ himself, furnish the proofs."

In the 24th Article of Charge he was charged with having affirmed:—(1) That the worship of Christ is idolatry; (2) That it is inconsistent with the worship of the true God; (3) That it is an instance of holding up our hands to a strange God; (4) That it outrivals the worship of the one true God; and (5) That it draws away our highest homage and affection from God to another. He

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asked: "Where are the Articles of Religion which any one of these propositions contradicts?" The phrase "worship of Christ" does not occur once in all the Articles and Creeds, as applied to any of the Divine Persons of the Trinity. The word "worship" only occurs twice in the Creeds. If meant in the Nicene Creed as a doctrine, he had not denied it in the propositions above stated; if as a fact, he had not disputed that the Holy Ghost is worshipped together with the Father.

In the 25th Article of Charge he was said to have affirmed, "That the very idea of the incarnation of the Son of Man takes its rise in unbelief, and springs out of absolute infidelity," which he maintained was an incorrect representation of his actual words, which were: "The very idea of incarnation itself implies a belief that God does not, nor ever did, dwell in the hearts of all men," which did not contradict any Article, and only expressed an opinion of his own.

In Article 26 he was charged with having affirmed:—(1) That the expected return of Christ to judge the world takes its rise in unbelief, and springs out of absolute infidelity; (2) That such expectation is unreasonable; (3) is opposed to the simplicity of the love of God as a Father; and (4) is calculated to overthrow the moral government of God. To the first proposition—which was intended to charge him with teaching contrary to the three Creeds and the 4th Article of Religion—he replied that, in the Sermon whence the incriminated passage supporting the charge was taken, he was attacking the "prevailing views" and the "common notion" about the coming of a God into the world once, and his expected return to judge the world, which, he affirmed, turn entirely upon the belief in an absent God, and take rise in unbelief, and only spring out of absolute infidelity. To the second proposition he answered, that he had nowhere affirmed that the expected return of Christ, &c., is unreasonable, but had applied the word "irrational" to some "prevailing views" and "common notions"—meaning the expectation which prevailed in the generation of and after Christ, that He would return very soon, and reign on earth as a visible King. As to the third proposition, he denied the words ascribed to him; what he had said like them was directed against the "prevailing views and the doctrines of

so-called Christianity." The fourth proposition involved his disbelief of the words attributed to our Saviour as to his coming again, the expectation of which, as it did not happen, he considered an irrational expectation, which, if realized, was calculated to overthrow the moral government of God; and this, he contended, he was neither forbid to think nor say by any Article of Religion or Creed. In the 27th Article he was charged with affirming:—(1) That the worship of the Father, Son, and Holy Ghost is the worship of three Gods; (2) That the worship of the Son and Holy Ghost is idolatry; (3) "That the belief in the Godhead of the Son and of the Holy Ghost, as expressed in the Nicene Creed, weakens and disguises the belief in one God the Father, and obliterates the true name of God." All these propositions, he stated, were untruly alleged against him. He had nowhere made any one of these three statements. What he had said, if it had reference to any clause in the Nicene Creed, was that any clause added to the belief in one God seems to weaken and disguise that belief.

Passing then to the last group of Articles, by the 31st, 32nd, 33rd, and 34th he was charged:—(1) By the 31st Article, with affirming, "in derogation and depraving of Holy Scripture, that revelation of the knowledge of God by means of any book is impossible;" (2) "That all true knowledge of God comes directly from the law of God, written in men's hearts;" (3) "That all knowledge of God comes only from men's own sense of what he requires them to do;" (4) "That the only true revelation possible by God to man, is through the sense of God's presence;" (5) "And is originated in the heart of man independently of God's written word." He replied that had he said any one, or all, of these propositions, he would not have contradicted a single statement in the Articles and Creeds: and he maintained that the doctrine of Holy Scripture laid down in the 6th Article of Religion, to which he referred, says not one word against any of these propositions. To the first proposition, he denied that he had said anything "in derogation and depraving of Holy Scripture," intending to be speaking of the sources of human knowledge of God antecedent to the Bible. Clauses 2 and 3 he admitted, but denied that either of them contradicted any of the Articles of Religion. In Clauses 4 and 5 he had used the word "Revelation" not as synonymous, as assumed, "with the Holy Scrip-

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tures, which are loosely called Revelation;" and which term is not applied to them by the Articles or Creeds, or the Prayer Book, and was in strict accordance with the 10th Article of Religion. In Article 32 he was charged with having affirmed, "That in God's word written, Holy Scripture, and Holy Writ, there are found manifest, palpable, and irreconcilable contradictions, and many places which cannot be expounded but so that they be repugnant to others." He declared he should never be so blasphemous as to say anything of this kind of God's word, written or unwritten. He did not know of any collection of writings to which the term "God's word written" literally and exactly applied. Recent decisions, he contended, had declared that no doctrine about the Holy Scriptures can be fairly based on the term "God's word written," but that it is to be considered merely a loose name for the collective canonical books called the Holy Scriptures; and he referred to the rule for the interpretation of the 26th Article of Religion laid down in the judgment in the cases of *Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall* (1) as conclusive; and that, under the shadow of that decision, he had affirmed, and then repeated with all his heart and earnestness, that some parts of the Bible are not true; that "there are in it manifest, palpable, and irreconcilable contradictions, and that some places in it cannot be expounded but so that they are repugnant to others." In answer to the 20th Article of Religion, which declares it is not lawful for the Church to expound one place of Scripture so that it be repugnant to another, he replied that he had nowhere declared that it *is* lawful for the *Church* so to do. In the 33rd Article he was charged with affirming:—(1) "That the authority of the Gospel according to St. John is doubtful;" (2) "That the said Gospel ought not to be applied to establish any doctrine;" (3) "That whole chapters of the said Gospel are crowded with passages which represent Jesus Christ as speaking words which he never could have spoken, and which if spoken, would not have been believed." In answer to these propositions, he denied the first: he had nowhere affirmed as there stated; and having regard to the 6th Article of Religion, "Of the Sufficiency of Holy Scripture for Salvation," and the canonical books there enumerated, "of whose authority was never any doubt in the Church," he required to know

(1) 2 Moore's P. C. Cases (N.S.) 375. 10 Jur. (N.S.) 40.

what Church was meant; because, if that of the first and second centuries, the Epistle to the Hebrews and the Book of Revelation would be excluded, and probably this very Gospel according to St. John. He received all the books there enumerated, and accounted them canonical, and had nowhere denied that any book was not canonical or ought not to be received. He denied the charge in the second proposition. With regard to the third, he admitted it without reserve; and maintained that he had a legal right so to speak, even of whole chapters, if he did not reject a whole book, or call it uncanonical. The 34th and last Article charged that he affirmed:—(1) "That the said Gospel according to St. John contains passages which can only be expounded so that they be repugnant to each other, or to other places in God's Word written, or Holy Scripture;" (2) "That the character of our Lord Jesus Christ, as set forth in the said Gospel, is quite irreconcilable with the idea of his being a true teacher sent from God, and is entirely different from the character of the Christ of the other three Gospels." He admitted the first of these propositions, but made the admission well knowing that the statement contradicted no Article or Creed of our Church. The second proposition was incorrectly drawn, and was not true. It should have stood thus: That the character of our Lord Jesus Christ, as set forth *in parts* of the said Gospel, is quite irreconcilable, &c. This amended proposition he asserted to be true, and that he had full legal right so to assert it.

Having concluded the examination of all the Articles of Charge, the Defendant proceeded to cite passages extracted from the writings of Divines, both living and deceased, stating views, as he alleged, more or less in accordance with his own, and at variance with the popular glosses upon the Articles and Creeds, for contradicting which, he contended, he was prosecuted. With this view he read numerous extracts from printed Sermons, Tracts, Essays, Charges, Lectures, Letters, Writings, and Works on Divinity, by ancient as well as modern writers, many of whom, the Defendant alleged, had gone much further away from the Articles and Creeds than he had done. Objection was taken by Counsel to the reading of these extracts, as being of themselves of no authority, especially as regarded the living authors, and as not capable of

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being applied, unless so written as to support the particular view taken by the Defendant on the construction of the particular Article of Religion which he was charged to hold doctrines repugnant to; and then not fairly or legally applicable without reference as well to the context of the works from which they were extracted as others known to be held or promulgated by these authors cited. None of the works cited were treatises on the Articles of Religion, or on any one of the distinct heresies alleged against the Defendant, nor had he used or referred to any of them in his argument and defence on the Articles of Charge.

THEIR LORDSHIPS, not being pressed for a decision on the admissibility of these extracts, and notwithstanding their miscellaneous nature and multiplicity, permitted the Defendant to proceed with them, but intimated their opinion that though, as they had before expressed, Mr. *Voysey* was at liberty to read any part, or the whole of any Sermon of his own, that he thought material, as explaining or justifying the passages contained in the Articles of Charge, or the meaning attributed to them, it seemed little else than loss of time to read isolated passages from works of Divines, whether ancient or modern, whose opinions could not fairly be gathered from the passages so selected without referring to the context of their works, and with whose opinions, even if correctly gathered from the passages cited, the Defendant, in many cases, stated that he did not agree.

On the conclusion of the Defendant's address the Lord Chancellor stated, that their Lordships proposed to take time to consider their judgment, and did not require the Solicitor-General to reply, unless he himself was desirous of doing so. His Lordship observed that the mass of opinions, ancient and modern, which had been quoted were wholly beside the real issue; the only question being, whether the passages cited from Mr. *Voysey's* Sermons were contrary to the Articles of Religion.

The *Solicitor-General*:—

Your Lordship's observations regarding the extracts from the numerous authors which have been read by Mr. *Voysey*, relieve me from a great deal of embarrassment; as though I could not pretend

to follow the Defendant through all the passages he has selected, I am quite prepared to shew that in a great number, and, indeed, all that I have been able to examine, he has misconceived and misunderstood the meaning of the authors whose writings he has cited, many of whom, even in the passages quoted, would be found, if the context of those passages is examined, to have held opinions entirely different from those attributed to them by Mr. *Voysey*, and to be as far as possible from giving countenance or support to any argument he has used against the interpretation of the Articles and the teaching of the Church. I must observe, moreover, that in the long and careful analysis of the Articles of Charge which Mr. *Voysey* has read, and while combatting and refuting, as he intended, those several charges, he made reference to no single one of these authors, nor did he cite the writings of any one of them, as countenancing or agreeing with him in the doctrines and opinions he has promulgated, and for which he is now prosecuted. Your Lordship's intimation that I need not address myself to these quotations, relieves me also from the necessity of protesting against the use sought to be made of the authority and character of the names of living authors, from whose writings extracts have been read, and who would have just reason to complain of their opinions being misunderstood if not mis-stated, and their names mixed up with charges so serious as are made against Mr. *Voysey*, without an opportunity given to them to explain, or, if requisite, defend their views and opinions. I very gladly, therefore, refrain from naming any one of them. Your Lordships are well aware that it is a rule in our Courts, that in citing the opinions of legal writers none are allowed as authority, if permitted to be referred to at all, but such as are to be found in the works of deceased authors, and I need not urge that if such a rule is held and observed in regard to opinions on points of abstract law, which depend on known principles and admitted decisions, how much more reason there is for a Court of Justice to be scrupulously cautious before giving admission, or allowing any weight to the opinions of living writers on abstract questions of divinity not purposely and with special intent pointed to the particular doctrine in controversy; and which opinions, so long as the author lives, may be modified, or changed at any time, on his further consideration. I do not gather from

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Mr. *Voysey* that he seeks to shelter himself under any supposed immunity which the change of the form of declaration of assent to the Articles and Book of Common Prayer that has been made by the *Clerical Subscription Act*, 28 & 29 Vict. c. 122. I do not apprehend that your Lordships would hold that the "Declaration of Assent" there required gives greater latitude to the Clergy than the form previously in use; but if it did, Mr. *Voysey* could not avail himself of that argument, as he made the declaration regarding the Articles and Formularies of Religion which we say he has violated, under the Statutes of *Elizabeth* and *Charles* II., and before the Act now in force was passed. The main fallacy, as I apprehend, which underlies the whole of Mr. *Voysey's* argument, is, that he perpetually repeats, and recurs to the assertion, that he has nowhere affirmed what the Articles denied, or denied what they affirm. Of course had he done that there would be an end to discussion, since it is too obvious to require argument that in such a case he could have no defence, and must be instantly and justly condemned. He maintains, however, that if he has not directly contradicted any statement in the Articles or Creeds themselves *in ipsissimis verbis*, he cannot be condemned, and he claims full liberty to attack, criticize, impugn, and throw doubt and discredit on any of the doctrines contained in the Articles or Creeds, on the plea that he is not contradicting or impugning the Articles themselves, but only what he terms the popular glosses and opinions on the Articles. Such glosses and popular theories, however, as he terms them, are the received and obvious meaning of the language and import of the Articles themselves, such as have been accepted and adopted as well by the Church, as by every one capable of understanding language in its ordinary form. I must remind Mr. *Voysey*, also, that he is not at liberty, even while commenting on what he terms the glosses of others on the Articles, to put his own interpretation on them. He is bound by the declaration prefixed to the Articles which he has solemnly accepted and assented to, and which declares "That no man hereafter shall either print, or preach, to draw the Articles aside any way, but shall submit to them in the plain and full meaning thereof; and shall not put his own sense or comment to be the meaning of the Articles, but shall take them in the literal

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and grammatical sense." Mr. *Voysey* seems to think that if he cannot understand a doctrine set forth by the Articles of the Church, he may not only reject it, but impugn and discredit it, and he has certainly, without that grave consideration which the subject demands, arraigned and impeached the doctrines of the Church on the most solemn and vital truths which have been, and still are, the support and comfort of thousands of her community.

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Judgment was reserved by their Lordships, and was now delivered by

THE LORD CHANCELLOR:—

In this case the Rev. *Charles Voysey*, Vicar of *Healaugh*, in the Diocese of *York*, originally appealed from an Interlocutory sentence or decree of the Judge of the Chancery Court of the Province of *York*, admitting certain Articles of Charge, in a cause wherein the office of the Judge was promoted by *Thomas Shepherd Noble*, of the City of *York*, against the Rev. *Charles Voysey*, by virtue of letters of request from His Grace the Archbishop of the Province.

Mr. *Voysey* was charged with having offended against the Laws Ecclesiastical by writing and publishing within the diocese of *London* certain sermons or essays, collected together in parts and volumes, the whole being designated by the title of "*The Sling and the Stone*," in which he is alleged to have maintained and promulgated doctrines contrary and repugnant to, or inconsistent with, the Articles of Religion and Formularies of the Church of *England*.

The offence being alleged to have been committed in the diocese of *London*, a Commission of Inquiry was issued by the Bishop of that diocese, and the Report of the Commissioners and depositions of witnesses were transmitted to the Archbishop of *York*, in whose diocese the preferment held by Mr. *Voysey* is situate.

On the 28th of October, 1869, Articles were exhibited in the Chancery Court of *York* on behalf of the Promoter, containing the several charges made against Mr. *Voysey*.

Mr. *Voysey* appeared in person, and opposed the admission of those Articles, and on the 22nd of December, 1869, the Judge, after hearing Counsel for the Promoter, admitted the Articles, and

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condemned Mr. *Voysey* in the costs of the opposition to their admission.

From that sentence Mr. *Voysey* presented his appeal, by which he asked that the sentence or decree so made might be reversed, and, further, that this Committee would retain the Cause, and hear and fully determine the same.

The Promoter, the Respondent in that appeal, also made the same request as to the retaining and final determination of the whole cause.

The Committee heard the Appellant in person on that part of his application which sought to reverse the decision of the Court below as to the admission of the Articles, and at the conclusion of his argument informed the Counsel for the Respondent that they were of opinion, subject to further discussion on the part of the Respondent, that the 13th Article could not be sustained, but that the other Articles had been properly admitted. They at the same time informed the Appellant that such admission of the Articles would not prejudice his right at the hearing to dispute the validity of the charges contained in the Articles as constituting an offence against the Laws Ecclesiastical.

Their Lordships, after consideration of the peculiar circumstances of the case, further stated that they would be ready to retain the Cause if both parties should continue to be desirous that that course should be taken, and should enter into proper admissions for that purpose.

Accordingly, after taking time for consideration, the Counsel for the Respondent agreed to the withdrawal of the 13th Article of Charge, and both parties entered into formal admissions, enabling this Committee to retain and finally determine the Cause on its merits.

The Respondent, the original Promoter, was then heard by Counsel in support of the charges made by the Articles, and the Rev. *Charles Voysey*, the Defendant, was heard in person in answer to the whole case as contained in the Articles (reformed by the omission of the 13th), and the Solicitor-General, on behalf of the Promoter, was heard in reply.

The Committee have now, therefore, to determine whether or not the offences charged by the Articles, or any of them, have been established.

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The Articles have been framed in accordance with the principles laid down in several cases by the Court of Arches and by this Committee. The incriminated passages of Mr. *Voysey's* work are fully cited. The Articles of Religion and Formularies of the Church which those passages are alleged to contravene are specifically referred to, and are also fully set forth.

The first of the Articles of Charge formally states the character of the alleged offence.

The next five Articles of Charge aver the publication of Mr. *Voysey's* work. The 7th, 8th, and 9th Articles of Charge contain copious extracts from such publications.

By the 10th, 11th, and 12th Articles of Charge Mr. *Voysey* is charged with asserting, in the extracts above named, several propositions inconsistent with the doctrine contained in the 15th and 31st Articles of Religion and certain parts of the Book of Common Prayer (set out in the 14th Article of Charge) with reference to the Atonement or reconciliation for sin made by Christ.

The 13th Article we rejected, because it charged Mr. *Voysey* with opposing "commonly received doctrines," which received doctrines, not being distinctly specified, their Lordships could not assume to be the same as those contained in the Articles of Religion or Formularies of the Church.

The 14th Article of Charge sets forth in full the Articles of Religion, and parts of the Book of Common Prayer, alleged by the previous Articles to be contravened.

The 15th and 16th Articles of Charge set forth a second set of extracts from Mr. *Voysey's* publications.

By the 17th Article Mr. *Voysey* is charged with contravening the doctrines of Original Sin and the Fall of man as specified in the 9th of the Articles of Religion, and the parts of the Book of Common Prayer set forth in the 19th Article of Charge.

The 18th Article of charge alleges that Mr. *Voysey* has contravened, in the second set of extracts, the doctrine of Justification by Faith, as asserted in the 2nd and 11th of the Articles of Religion, and the Homily in the 11th of such Articles, and the parts of the Book of Common Prayer mentioned in that behalf in the 19th Article.

The 19th Article of Charge then proceeds to set forth the par-

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ticular passages of the Articles of Religion, and of the Book of Common Prayer, and of the Homilies alleged to be contravened.

The 20th, 21st, and 22nd Articles of Charge set forth a third set of passages from Mr. *Voysey's* publication; and

By the 23rd, 24th, and 25th Articles of Charge Mr. *Voysey* is alleged to have contravened in these passages the doctrine of the Divinity or Godhead of Our Lord Jesus Christ, and the doctrine of Incarnation, as contained in the 1st, 2nd, 4th, and 8th Articles of Religion, and the parts of the Book of Common Prayer set forth in subsequent Articles of Charge.

By the 26th Article of Charge Mr. *Voysey* is charged with denying the return of Christ to judge the world, in contravention of the 4th and 8th Articles of Religion, and the parts of the Book of Common Prayer set out in a subsequent Article.

By the 27th of the Articles of Charge Mr. *Voysey* is charged with contravening the doctrine of the Trinity, contrary to the 1st, 2nd, 5th, and 8th of the Articles of Religion and the parts of the Book of Common Prayer set forth in the next Article.

The 28th Article then proceeds to set out the Articles and parts of the Book of Common Prayer alleged to have been contravened by the third set of extracts, and also certain Homilies of the Church on the same subject.

The 29th and 30th Articles of Charge set out a fourth set of extracts from Mr. *Voysey's* publication.

By the 31st, 32nd, 33rd, and 34th Articles of Charge Mr. *Voysey* is alleged, by the last cited passages of his work, to have expressed himself in derogation and depraving of Holy Scripture, and especially with reference to the Gospel according to St. John.

The 35th Article of Charge accordingly sets forth the Articles of Religion and parts of the Book of Common Prayer, and also part of the Homilies applicable to the last set of Charges.

The 36th Article of Charge refers to the whole of the publications of Mr. *Voysey* from which extracts have been given, and the last two Articles of Charge (the 37th and 38th) are formal.

The charges, therefore, against Mr. *Voysey* are thirteen in number, which may be arranged under the following classes:—

1. Alleged errors concerning the reconciliation of God to man

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by the sacrifice or propitiation of Our Lord Jesus Christ, and as to the necessity of such reconciliation.

2. Alleged errors as to the Incarnate Godhead of Our Lord, and the doctrine of the Holy Trinity.

3. Alleged errors as to the authority of the Scriptures or Holy Writ.

Before examining the charges and comparing the proofs adduced from Mr. *Voysey's* publications with the charges founded thereon, and with the Articles and Formularies of the Church alleged to have been contravened, it will be well to enunciate, briefly, the rules of judicial exposition with reference to the Articles and Formularies of the Church.

In this respect we have the guidance of previous and recent decisions of this Tribunal, expressed in clear and definite language.

In the cases arising on the work called "*Essays and Reviews*" (*Williams* v. *Bishop of Salisbury*, and *Wilson* v. *Fendall* (1), Lord *Westbury*, in delivering the opinion of the Committee, said: "Our province is, on the one hand, to ascertain the true construction of those Articles of Religion and Formularies referred to in each charge according to the legal rules for the interpretation of Statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church ascertained in the manner we have described."

But it is to be observed, that in inquiries of the nature now before us, this Committee is not compelled, as in cases affecting the right to property, to affix a definite meaning to any given Article of Religion the construction of which is fairly open to doubt, even should the Committee itself be of opinion (on argument) that a particular construction was supported by the greater weight of reasoning. Thus, Lord *Stowell*, in the case of *Her Majesty's Procurator* v. *Stone* (2) thus expresses himself: "I think myself bound at the same time to declare that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature, and that if any Article is really a subject of dubious interpretation it would be highly improper that this Court should fix on one meaning, and prosecute all those who

(1) 2 Moore's P. C. Cases (N.S.) 375, 424. (2) 1 Hag. Cons. Rep. 429.

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hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them."

We have thought it right to refer to the canons of construction thus judicially expressed, because on the one hand they allow to the party accused a fair and reasonable latitude of opinion with reference to his conformity to the Articles and Formularies of the Church, and on the other they afford no sanction whatever to the contention of Mr. *Voysey*, that unless there be found in the publication complained of a contradiction, *totidem verbis*, of some passage in the Articles, he is at liberty to hold, or rather to publish, opinions repugnant to or inconsistent with their clear construction.

As regards those Articles of Religion as to the construction of which a reasonable doubt exists, the question may arise how far opinions of a similar character to those charged to be heretical, have been held by eminent Divines without challenge or molestation, because the proof of their having been so held may tend to shew the *bona fides* of the doubt. In this respect also we have ample guidance from authority; and it will be found that where the Article in question is subject to reasonable doubt, and eminent Divines have held opinions similar to those impugned in the case before the Court, that circumstance alone has been held to be of great weight in inducing the Court to allow a similar latitude of construction to the party accused, without itself deciding upon the construction of the Articles.

Thus, in the case of *Williams* v. *The Bishop of Salisbury* (1) the judgment of the Judicial Committee contains this passage:—

"It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion; there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant; there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceed-

(1) 2 Moore's P. C. Cases (N.S.) 424. 16 Jur N S 410

ing like the present are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in or to be collected from that which is written."

To proceed, then, to the particular offences charged to have been committed by Mr. *Voysey*.

In the passages cited from his publication called "*The Sling and the Stone*," in the 7th, 8th, and 9th Articles of Charge, he is alleged to have maintained the following positions:—

I. That Christ has not made an atonement or reconciliation for sin, and has not been made a sacrifice to reconcile the Father to us (10th Article of Charge).

II. That there is no need of any atonement or sacrifice, nor any place for such in the purpose of God (11th Article of Charge).

III. That Christ did not bear the punishment due to our sins, nor suffer in our stead, and that to think that he did, or that it was necessary that he should suffer, is the most revolting of all the popular beliefs (12th Article of Charge),

The 13th Article of Charge we have rejected.

Now, the 2nd Article of Religion expressly asserts that Christ "truly suffered, was crucified, dead and buried, to reconcile His Father to us, and to be a sacrifice, not only for original guilt, but also for all actual sins of men." The 15th Article of Religion declares that Christ "came to be the Lamb without spot, who, by sacrifice of Himself once made, should take away the sins of the world." And the 31st Article of Religion declares that "The Offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual; and that there is none other satisfaction for sin, but that alone."

We cannot doubt that these lastly-mentioned Articles of Religion assert in plain language that Christ was crucified to reconcile His Father to us (that is, to mankind), and was a sacrifice, and that He came by the sacrifice of Himself to take away the sins of the world—that the offering of Himself once made is a perfect "propitiation and satisfaction for the sins of the whole world" and that there is none other satisfaction for sin but that alone.

Neither can we doubt that it is plainly inconsistent with such

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statements to say that Christ has not made a reconciliation for sin, or has not been made a sacrifice to reconcile His Father to us; or that there is no need for any sacrifice, nor any place for such in the purpose of God.

It will only remain then to inquire as to the first two charges against Mr. *Voysey*, whether he has in the passages of his work cited in that behalf, asserted the propositions therein charged.

Before doing so it may be well, however, to observe that when the Articles of Religion speak of sacrifice and oblation, and speak also of Christ being the Lamb without spot, and of His offering of Himself being a perfect satisfaction, and further allege that there is none other satisfaction for sin but that alone,—it is impossible to construe the word "sacrifice" in any other sense than that in which it is ordinarily used, viz., as an offering to God, and that as such offering Christ's sacrifice is alleged to be a satisfaction, and the only satisfaction, for the sins of the world.

Let us consider, then, the following passages in Mr. *Voysey's* publication, as cited in the Articles of Charge. In Article VII. this passage is extracted from Vol. II. pt. 2, of Mr. *Voysey's* Sermons:—

"He [meaning the Saviour] never hinted at such a doctrine as that of the Fall of man, or the Atonement by sacrifice or Justification by Faith. He never taught that men needed to be accounted righteous before God, or needed any mediator to propitiate His wrath or to draw them to Himself. All these notions were Jewish, and Christ never gave any sanction or encouragement to them that I have been able to discover."

And, again, from the same volume and pt., "Sincere sorrow for sin is, or ought to be, enough to make a man quite reconciled and at peace with God; at least, so our Lord teaches. We do not, therefore, *need* any atonement or justification. We need no atonement, for God requires none. We do not want to be justified, we do not want to be *accounted* righteous at all when we are not righteous; we only desire to be *made* righteous in God's good time. We seek reconciliation with God as a sorrowful and guilty son seeks reconciliation with a father: 'I will arise and go to my Father,' &c. The Father in Heaven receives and embraces us, only with a compassion more tender, and a love more Divine and

inexhaustible. So we leave these Pauline doctrines for those who need them, thanking our Heavenly Father that through His Son Jesus Christ we have learnt a better and surer way to that peace of God which passeth all understanding."

* * * * * * * *

Again, in the same Article, and from the same volume: "The majority of Christians, though fast tending to a change in their views, still maintain, like the Christianised Jews of the first century, a belief in a God who requires sacrifice—actual blood-shedding—mediation instead of personal communion with the sinner, and is the God only of a chosen people, who loves the few that shall be saved, and leaves the rest to be damned, and who only loves and saves the few because Christ had died for them as their sacrifice."

* * * * * * * *

And again, in the same volume: "To us God is a Father, and we are his children; and if this be true it sweeps away the dusty cobwebs of mediation, intercession, sacramental sacrifice, and all the sacred and consecrated follies which grow out of it. We want neither altar nor sacrifice, neither victim nor priest, no sprinkling of blood nor fumes of burning incense, to render our approach to the mercy-seat of God more reverent or more successful."

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And in the same Article of Charge this passage is set out, extracted from Vol. III. of the Sermons: "I must own, however, that while I thoroughly and heartily embrace the truth that Christ is our example, I cannot so readily embrace what is often understood by the statement that he is a sacrifice for sin. In one sense Christ was indeed a sacrifice. His life was sacrificed to the bigotry and blind malice of Chief Priests in *Judea*. He was a sacrifice, too, in the sense of laying himself open to persecution by an honest discharge of his duty, and in not trying to escape trouble by a violation of principle.

"Sin, too, caused his death, as it was sinful to bear malice towards one so innocent and good, and still more sinful to put him to death for the claim which He made for himself and for us all—that God was his Father and our Father, and that we are his sons. But in what sense the death of Jesus Christ was a substitute for

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the punishment of your sins or mine I cannot discover. Theologians may be right, but until I can see reasonable ground for their opinion I must keep my own. I can surely see and thankfully confess that his death has done me good—that his sacrifice has been most beneficial to the world in teaching and encouraging true heroism, true manliness, and true obedience to God's will. Had He not been martyred for the truths which he taught, those truths would probably have been far longer in making their way among men, and *England* at this hour might still have been in Pagan darkness. But then I know this is not the common meaning of the words 'Christ suffered for us,' and I do not wish to pretend to put that meaning on them while I am using them in a totally different sense."

We think that the expressions contained in these passages, and particularly in the last extract, cannot be reconciled with the teaching of the 2nd, 15th, and 31st Articles of Religion as regards Christ being crucified to reconcile the Father to us, and the necessity of a sacrifice for sin; and we hold, therefore, that the 10th and 11th Articles of Charge are proved against Mr. *Voysey*.

As regards the third charge against Mr. *Voysey*, contained in the 12th Article of Charge—namely, that he has asserted "that Christ did not bear the punishment due to our sins, nor suffer in our stead and for us, and that to think that he did, or that it was necessary he should so suffer, is infinitely erroneous and dishonouring to God, and is the most revolting of all the popular beliefs"—we may remark that the somewhat uncharitable denunciation by Mr. *Voysey* of all who may happen to differ from him in holding this popular belief is not the substance of the charge. The question is, whether it be or not consistent with the Articles of Religion to deny that Christ bore the punishment due to our sins, or suffered in our stead. We think that to deny this statement without any qualification is inconsistent with the plain meaning of the 2nd, 15th, and 31st Articles of Religion already cited: the latter of which Articles is headed, "Of the one Oblation of Christ finished on the Cross," and proceeds to describe that offering to be the perfect redemption, propitiation, and satisfaction for the sins of the whole world.

In these Articles, also, our Lord is described as without spot,

i. e., sinless, and as suffering the painful death of the cross, which is styled His offering of Himself, and the result of His suffering so offered is said to be the redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual. It is not consistent with such statements to aver without any qualification that He did not bear the punishment due to our sins, nor suffer in our stead.

The passage we have lastly cited is one in which Mr. *Voysey* might seem to us to admit that he contravenes the Articles of Religion, for he fairly says that the common meaning of the words "Christ suffered for us" is totally different from the sense in which he uses those words. Had Mr. *Voysey* spoken less explicitly, we should have been disposed to regard his denial of the doctrine in question as having reference to some exaggerated statement respecting Christ having borne in hell the punishment due to man's sin: and even as it is, we are not unwilling to give Mr. *Voysey* the benefit of this doubt.

In considering these first three charges, as in the consideration of those that follow, we have been most anxious to arrive at a fair construction of Mr. *Voysey's* writings, not only by examining the context which he has referred to as bearing on the passages cited, but also by attentively considering whether any previous writer, himself in Holy Orders, has been allowed, with impunity, to assert opinions similar to those of Mr. *Voysey*, so as to afford reasonable ground for holding that Mr. *Voysey* has merely availed himself of the privilege of adopting a possible interpretation of the language of the Articles, although it may appear to us that such interpretation is not sound or correct. But we can find nothing of the kind. Mr. *Voysey*, indeed, constantly refers to his views as being different from generally received doctrine, and he does not in his book, nor has he in his argument, cited any authority of Divines holding views corresponding with his own. He founds, indeed, his argument mainly on the denial of original sin, or any original curse occasioned thereby, which assertions form the subject of other Articles of Charge; and if such be not a correct view of the meaning of the Articles of Religion, it is not surprising that the consequences he has derived from this doctrine should be equally inconsistent with them.

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We have not, however, forgotten to observe, that a considerable portion of Mr. *Voysey's* arguments in his writings is directed against special views of vicarious punishment and imputed righteousness which many Divines have held, and which many other Divines have considered exaggerated and unreasonable. If he had confined himself to such arguments as he might think fairly adducible in explanation of the doctrine enunciated in the Articles of Religion as to Christ suffering for sin, and offering Himself as a Lamb without spot for all sins original and actual of the whole world, and being crucified in order to reconcile us to His Father, then he would be entitled to claim a latitude of interpretation which has been allowed to others; but he does not profess to interpret, he simply denies the positions asserted in the Articles, and asserts other doctrines inconsistent with and repugnant to them.

We now proceed to consider the fourth and fifth charges made against Mr. *Voysey*, contained in the 17th and 18th Articles of Charge, viz., his alleged assertion, "That mankind are not by nature born in sin and the children of God's wrath, and are not separated from God by sin, and under his wrath, or under a curse, and that they are not in danger of endless suffering, nor is there any curse to remove by the shedding of the innocent blood of Christ, and that the doctrine of the Fall of man is contrary to the teaching of Jesus Christ," contrary, it is contended, to the 2nd and 9th Articles of Religion; and again, "That mankind need no atonement or justification, that salvation is not through justification, and that the doctrine of justification by faith is contrary to the teaching of Jesus Christ," which is alleged to contravene the 2nd and 11th Articles of Religion.

Now, the 2nd Article of Religion asserts that the "Son suffered to reconcile His Father to us, and to be a sacrifice, not only for original guilt, but also for all actual sins of men;" and the 9th Article of Religion in treating of "Original or Birth-sin" says that it "standeth not in the following of Adam . . . . but that it is the fault and corruption of the Nature of every man that naturally is engendered of the offspring of Adam; whereby man is very far gone from Original Righteousness, and is of his own nature inclined to evil, so that the Flesh lusteth always contrary to the Spirit, and

therefore, in every person born into the world, it deserveth God's wrath and damnation."

We think that the plain meaning of the 9th Article is to assert the existence of original or birth sin, and to state that such sin exists in every one descended from Adam; that by it every man is very far gone from original righteousness; and that this sin "deserves God's wrath and damnation."

To assert, therefore, that children are not by nature children of God's wrath—that they are not separated from Him by sin, nor under His wrath, appears to us plainly inconsistent with the express language of the Articles of Religion. It being also expressly laid down that Christ suffered to reconcile the Father to us, and to be a sacrifice for original sin, it appears to us to be in contradiction to such statements to say that we are not under a curse, and that there is no curse to remove by the shedding of the innocent blood of Christ. To assert also that the doctrine of the Fall of man is contrary to the teaching of Jesus Christ, whereas the 9th Article plainly asserts the doctrine, appears to us to contradict the Article.

The question how far a denial of the doctrine, that man being in sin is therefore an inheritor of endless suffering, plainly contradicts the Articles, may be open to much more doubt, regard being had to the decision in *Wilson* v. *Fendall* on the subject of assertions of a similar character with regard to the duration of the punishment of the wicked; but with this exception it appears to us to be clear, that if the fourth charge be, in fact, established by Mr. *Voysey's* writings, the offences therein alleged would be offences against the Law Ecclesiastical.

Do, then, the extracts set out in the 15th and 16th Articles of the Charge, taken from Vol. II. and III. of the Sermons, bear out the charge?

Mr. *Voysey* in the first of these extracts says, by way of censure of the opinion, "St. Paul said plainly that the whole human race should be set free from the curse in consequence of what Christ suffered—'As in Adam all die, so in Christ shall all be made alive;'" and in the following extract he says, after citing the opinions of *Augustine* and of *Milton*, "and though St. Paul's doctrine is the most merciful, yet he leaves the mind aghast at the picture

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of God's cursing the whole race of mankind, and only removing that curse after being appeased by the shedding of innocent blood. This, of course, was simply Judaism, with a little genuine gospel mixed up with it—an immense advance on the pre-existing views, but still far—very far, from the sublime teaching of our Lord Himself." The following extract should also be considered: "He therefore [meaning the Apostle St. Paul] succeeded in teaching many, both Jews and Gentiles, who had superstitions about sacrifice in common, to believe that the death of Christ was a sufficient atonement for the sins of the whole world; and that it appeased the wrath of God entirely, and cancelled the curse against mankind. The arguments used by the Apostle might satisfy the Jews, but could scarcely satisfy us: as, for instance, when he says 'Christ hath redeemed us from the curse of the law, being made a curse for us,' because He was *crucified*, he quotes from some Jewish record that 'cursed is everyone that hangeth on a tree,' as if the mere outward manner of Christ's death could of itself furnish any satisfaction to the human mind that that death removed a curse from the whole race. That such an argument could be used by St. Paul discloses to us how very deep down these Jews were sunk in dogmatic unreasonableness. At all events, he satisfied *them* that as by Adam's disobedience men had fallen from God, so by the death of Christ the curse was removed, and by His obedience He had rendered men righteous in the sight of God. Those who were dissatisfied with the old system at once embraced St. Paul's nobler and more rational views, and thankfully owned Jesus Christ as their Redeemer and Atonement, in a sense which, I do not scruple to declare, was never taught by our Lord Himself. But what could a Jew or Pagan do else?" * * * *

"They [meaning Ritualists or priests] are (most falsely, as it seems to me) convinced that we are all by nature in danger of endless suffering; and that, unless we obey *them* in thought, word, and deed, unless *they* pray and sacrifice for us, and *they* pardon our offences, there is no hope for us beyond the grave.

"We do not, then, wish to be ungrateful in declining their interference and in rejecting their control. We simply say to them, 'You have made a fatal error at the very outset of your principles. You have made an entirely false assumption at the

very beginning, and therefore we do not wonder that your course is altogether a foolish and mistaken one. You say we are by nature separated from God, or under His wrath—that He will not hear our prayers or forgive our sins until we have been baptized, and have submitted ourselves to your authority.' We deny this entirely. We say that we are *not* separated from God nor under His wrath; that God is always with us all, and we are his children by nature, and therefore we are near and dear to Him all our lives through. With or without your help we need no redemption in the sense in which *you* offer it to us. You are telling us we have got no friend here while outside your temple; but we know that we are not alone, because our Father is with us, and you can offer no friend, no Saviour, no Comforter, so good, and true, and faithful as *He*. We are therefore not afraid to disobey your injunctions, to tear up your creeds, and to despise your ordinances. For all these are based upon a fundamental mistake."

If, in the above extracts, the Appellant had been simply combating the extreme views which have been adopted by some Divines, either with reference to what is commonly called Calvinism on the one hand or Ritualism on the other, we conceive he would have been fully entitled so to do; and we should have been glad if we could have so reconciled his writings with the doctrine contained in the Articles and Formularies of the Church, but the extracts themselves are clearly intended to teach that in no sense are mankind naturally separated from God, or under God's wrath, which he represents to be a false assumption at the very beginning, and as occasioning the Ritualists, *on that account*, to take a foolish and mistaken course. It is true that he adds, as a portion of the error taught by them, and which he assumes to be their doctrine, "God will not hear our prayers, or forgive us our sins, until we have been baptized, and have submitted ourselves to your authority," meaning the authority of the Priest; and if this had been all it might have admitted of explanation consistent with the doctrine of the Church; but the Appellant makes his meaning clear, not only by the previously cited extract concerning St. Paul's teaching, but by what follows the last cited words, "We say that we are not separated from God, nor under His wrath; that God is always with us all, and we are His children by nature, therefore we are near and

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dear to Him all our lives through." "We know that we are not alone, because our Father is with us, and you can offer no friend, no Saviour, no Comforter, so good, and faithful, and true as *He*."

We cannot doubt that Mr. *Voysey* advisedly contravenes the doctrine of a change of man's natural condition (in which the Church represents him to be subject to God's wrath), through the sacrifice of Christ offered to reconcile His Father to us, and that the 4th Charge is therefore established.

As regards the 5th Charge against Mr. *Voysey*, we think that to assert that mankind needs no justification, or that salvation is not through justification, or that justification by faith is contrary to the teaching of Jesus Christ, is so plainly opposed to the very words of the 2nd and 11th Articles of Religion, that we need hardly cite them.

We have the advantage of an authoritative exposition, if any were required, of the 11th Article of Religion, in the case of *Heath* v. *Burder*, before the Privy Council (1), where Lord *Cranworth*, in delivering judgment, says, "The evident meaning of the 11th Article is, that man is accounted righteous, which in the Article is treated as the same thing as being justified before God, not for his own merits, but for the merits of Our Saviour by faith in Him, *i.e.*, that man is admitted to the favour of God not for his own works, but for the merit of his Saviour and by faith in Him, *i.e.*, by man's faith in our Saviour, howsoever faith is to be defined."

The following extracts from Mr. *Voysey's* Book appear to us clear contradictions of these Articles of Religion.

"He [meaning the Saviour] never even hinted at such a doctrine as that of the Fall of man, or the Atonement by sacrifice or justification by faith. He never taught that men needed to be accounted righteous before God, or needed any mediator to propitiate His wrath, or to draw them to Himself. All these notions were Jewish, and Christ never gave any sanction or encouragement to them that I have been able to discover." And again: "Sincere sorrow for sin is enough to make a man quite reconciled and at peace with God; at least so Our Lord teaches. We do not, therefore, need

(1) 15 Moore's P. C. Cases, 82.

any atonement nor any justification. We need no atonement, for God requires none."

These five heads of Charge complete the first of the three classes of Charge, and we will proceed to the second class, viz., those relating to alleged errors as to the Incarnation and Godhead of Christ.

Five Articles of Charge (the 23rd to the 27th inclusive) allege these errors—first, that Mr. *Voysey* asserts (23rd Article of Charge): "That Our Lord Jesus Christ is no more very God of very God, begotten not made, than we men are," contrary to the 2nd, 4th, and 8th of the Articles of Religion. Next, that he asserts (24th Article of Charge), "That the worship of Christ is idolatry, and is inconsistent with the worship of the true God, and that it is an instance of holding up our hands to a strange God, and outrivals the worship of the one true God, and draws away our highest homage and affection from God to another," contrary to the 1st, 2nd, and 8th Articles of Religion. Next, that he asserts (25th Article of Charge), "That the very idea of the Incarnation of the Son of God takes its rise in unbelief, and springs out of absolute infidelity," contrary to the 2nd and 8th Articles of Religion. Next that he asserts (26th Article of Charge), "That the expected return of Christ to judge the world takes its rise in unbelief, and springs only out of absolute infidelity, and that such expectation is unreasonable, is opposed to the simplicity of the love of God as a Father, and is calculated to overthrow the moral government of God," contrary to the 4th and 8th Articles of Religion. And lastly, that he asserts (27th Article of Charge), "That the worship of the Father, Son, and Holy Ghost is the worship of three Gods, and that the worship of the Son and of the Holy Ghost is idolatry, and that the belief in the Godhead of the Son and of the Holy Ghost, as expressed in the Nicene Creed, weakens and disguises the belief in one God the Father, and obliterates the true name of God," contrary to the 1st, 2nd, and 8th Articles of Religion.

The Articles of Religion referred to in the above five Articles of Charge undoubtedly recognise the Godhead both of the Son and of the Holy Ghost as co-equal with that of the Father, and recognise them as being with Him one God (1st Article of Religion); that the Son took man's nature in the womb of the blessed Virgin of her substance, and that the Godhead of the Son and His man-

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hood are united in Christ (2nd Article of Religion); that the Son ascended into Heaven, and there sitteth until He returns to judge all men at the last day (4th Article of Religion); and the 8th Article of Religion says that the Nicene Creed, Athanasius' Creed, and the Apostles' Creed are to be thoroughly received and believed. If, therefore, the last five Articles of Charge be proved they are plainly repugnant to the Articles of Religion.

We think it impossible to read the following passage or extract from Vol. III. of Mr. *Voysey's* works, contained in the 21st Article of Charge, without coming to the conclusion that the 6th Charge against him is made out:—

"And so God, the great unseen Creator, has wedded to Himself the great visible universe, and out of that mystical marriage has come as offspring the human family—a race of beings noble even as animals, but surpassing all we yet know of created life in being born of God—very God of very God—begotten not made, a statement as true of all of us as of Him who was called the first-born among many brethren." The extracts cited in the 21st Article of Charge, from Vol. II. of Mr. *Voysey's* works, clearly describe the worship of Christ as idolatrous, and thus the 7th charge made in the 24th Article of Charge is also established. We may cite for this purpose the following amongst other extracts from the same volume:—

"At the time when Jesus Christ, the Lord of men, appeared on earth, religious feelings towards God, in the hearts both of the Jew and Pagan, were such as to render impossible any repose in the bosom of the Creator. None could conceive of Him as even actuated by tender feelings, or as even guided by laws of justice such as were common amongst men. So the Christ in His life of pity and kindness began to be worshipped and loved, as infinitely nearer and dearer to human hearts than any Deity whom men had ever worshipped before.

"Not only was this perfectly natural, but under the circumstances it was infinitely creditable to mankind that they should worship and adore such a one as Christ was, instead of the Jehovah known to the Jews, and the Zeus and Jupiter known to the Greeks and Romans. Since the days of some of the Psalmists, their purer ideas of Jehovah had become miserably corrupted, and a

whole system of propitiatory sacrifices had taken the place of their sensible and manly devotion."

* * * * * * *

"But as soon as ever the notion gained ground that Jesus Christ was engaged on man's behalf, in assuaging the Divine wrath, all the love and trust of men rushed in a torrent towards Him, and they were quite content (as well they might be) to adore their Redeemer, and leave their Creator further off than ever. I do not wonder at this. The wonder would have been if men had not clung to Christ, if they had refused to worship so glorious a manifestation of Divine love and goodness.

"Yet surely, this is not what Christ would have of *us*. I always thought that he came to bring us to God. Whatever else may be recorded in the Gospels, most surely it is there recorded that He said all He could say, and did all He could do, to make men feel the Fatherly love of God for us all, to make known the Father in heaven, and to win back affrighted men from their ghastly dread. Jesus Christ desired and pressed upon us all to worship the Father —'His Father and our Father, His God and our God;'—and none will dare to say that He ever stepped in between men and their Maker to beguile their highest allegiance to Himself, to hide the Father's face, or to close the portals of the Father's home."

And again, from the same volume: "Belief in all these miracles [meaning the miracles recorded in the New Testament] and in these angelic messengers, and in these wonderful births was impossible, unless there had been first in men's minds belief in an absent God—in a God who was *not* immediately and constantly present in the world and among men. The very idea of Incarnation itself, which means Deity coming from heaven and dwelling in an individual man for some years, implies a belief that God does not, nor never did, dwell in the hearts of all men. This belief, and a belief in other miracles, are not peculiar to Christianity; they are common to all the religions of the world. The Brahmins have their nine incarnations of Vishnu, which, in their way, are splendid conceptions of Divine love and sympathy."

As regards the charge contained in the 25th Article of Charge, the last cited passage with reference to the Incarnation is sufficient proof.

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As regards the charge contained in the 26th Article of Charge, the following extract from Vol. IV. of Mr. *Voysey's* Sermons will suffice :—

"But the Fatherhood of God strikes more deeply at the prevailing views than this. The common notion about the coming of a God into the world once and His expected return to judge the world, turns entirely upon the belief in an absent God. It takes its rise in unbelief. These notions of a God coming to dwell amongst men in human form after thousands of years' absence from them, then departing, after a short life on earth, and not returning for thousands of years more, only spring out of absolute infidelity. Men must first be convinced that God is away from them before they can adopt the idea that God has sent some one to visit them. And if that one Man who came was very God of very God in a sense in which all other men are not, His going away again after a short human lifetime, proves that absence still more painfully; and it cannot be wondered at that His return to earth should be looked for and longed for with the most passionate eagerness of the soul. If God could leave the long ages of human life deserted by Him before the coming of Christ, and then, after the little space of thirty-three years, could leave mankind again for thousands of years more in the same desolate desertion, then He is not the Father of men, and we might then question if He is even our Friend."

Indeed, the author in an extract contained in the 9th Article of Charge, candidly states, "I found that I could not hold to the true Fatherhood of God if I did not give up some of the doctrines of so-called Christianity. The doctrines of mediation, intercession, atonement, isolated incarnation, and the expected return of Jesus to earth, are all, more or less, opposed to the perfect harmony and simplicity of the love of God as a Father."

As regards the 10th charge contained in the 27th Article of Charge against the Appellant, being the last of the general class relating to the Incarnation and Godhead of Christ, we think it is proved by the following passage, extracted from Vol. III. of Mr. *Voysey's* Sermons, "Take away (that is, from the Book of Common Prayer) what we can most heartily join in, and the greater part, as well as the most important part, of the Service would be expunged. For

the sake of this, then, we may well bear for a time with the blemishes, weaknesses, and minor superstitions which the Church of *Rome* bequeathed to us when we parted company at the last Reformation. We need not hesitate at the repetition of any creed which makes us say as its first words, 'I believe in one God, the Father Almighty, Maker of Heaven and Earth, and of all things visible and invisible.' Any clause added thereto which seems to weaken or to disguise that first grand utterance may well be tolerated, considering the changing times in which we live, for the sake of the cardinal and central and most vital principle upon which all the rest is, or is supposed to be based."

The four remaining charges against Mr. *Voysey* constitute the last general class of his alleged errors, viz., his depraving of Scripture; and they are as follows:—

That he has promulgated, in derogation and depraving of Holy Scripture, the doctrine that the revelation of the knowledge of God by means of any book is impossible; that all true knowledge of God comes directly from the law of God written in men's hearts; that all knowledge of God comes only from men's own sense of what He requires them to do; and that the only true revelation possible by God to man is through the sense of God's presence, and is originated in the heart of man independently of God's written Word (31st Article of Charge).

That he has asserted that in God's Word written, Holy Scriptures and Holy Writ, there are found manifest, palpable, and irreconcilable contradictions, and many places which cannot be explained but so that they be repugnant to others (32nd Article of Charge).

That he has asserted, in derogation and depraving of Holy Scripture, "that the authority of the Gospel according to St. John, is doubtful, and that the said Gospel ought not to be applied to establish any doctrine, and that whole chapters of the said Gospel are crowded with passages which represent Jesus Christ as speaking words which He never could have spoken, and which, if spoken, would not have been believed" (33rd Article of Charge).

That he has asserted "that the Gospel according to St. John contains passages which can only be expounded so that they be repugnant to each other or to other places of God's Word written,

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or Holy Scripture; and that the character of our Lord Jesus Christ, as there set forth, is quite irreconcilable with the idea of His being a Teacher sent from God, and is entirely different from the character of the Christ of the other three Gospels" (34th Article of Charge).

The first, second, and fourth of the offences alleged in the last-mentioned Articles of Charge are stated to contravene the 6th and the 20th Articles of Religion, and the 13th to contravene the 6th Article of Religion; and each of the said offences is also charged to be an assertion of Doctrine inconsistent with certain portions of the Book of Common Prayer, set forth in the subsequent Articles of Charge.

The 6th Article of Religion lays it down that there never was any doubt in the Church of the authority of the Canonical Books of the Old and New Testaments, and that the Church applies them to establish doctrine. Whilst the 20th Article of Religion declares "that it is not lawful for the Church to ordain anything that is contrary to God's Word written, nor may it so expound one portion of Scripture that it be repugnant to another."

Now it is very important upon this head of the inquiry to consider the judgment delivered by Lord *Westbury* in the case of "*Essays and Reviews*" (*Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall* (1)).

In considering one of the charges against Dr. *Williams* in that case, the judgment states the case thus:—

"The words that the Bible is 'an expression of devout reason, and, therefore, to be read with reason in freedom,' are treated in the charge as equivalent to these words:—'The Bible is the composition or work of devout or pious men, and nothing more;' but such a meaning ought not to be ascribed to the words of a writer who, a few lines further on, has plainly affirmed that the Holy Spirit dwelt in the Sacred Writers of the Bible. This context enables us to say that the words 'an expression of devout reason, and, therefore, to be read with reason in freedom,' ought not to be taken in the sense ascribed to them by the accusation. In like manner we deem it unnecessary to put any interpretation on the words, 'written voice of the congregation' inasmuch as we are

(1) 2 Moore's P. C. Cases (N.S.) 426.

satisfied that whatever may be the meaning of the passages included in this Article, they do not, taken collectively, warrant the charge which has been made that Dr. *Williams* has maintained the Bible not to be the Word of God, nor the rule of faith."

The judgment therefore is express in saying that the ground for regarding the statement of Dr. *Williams* as not exceeding the just limits allowed by the Articles of Religion was, that he did not state the Bible to be the composition of devout men, and nothing more. So, in considering the charge against Mr. *Wilson*, the following passage occurs (p. 429):—"In the 8th Article of Charge an extract of some length is made from Mr. *Wilson's* Essay, and the accusation is, that in the passage extracted, Mr. *Wilson* has declared and affirmed in effect that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the Word of God; and then reference is made to the 6th and 20th Articles of Religion, to part of the Nicene creed, and to a passage in the Ordination of Priests in the Book of Common Prayer. This charge, therefore, involves the proposition—that it is a contradiction of the doctrine laid down in the 6th and 20th Articles of Religion, in the Nicene Creed, and in the Ordination Service of Priests, to affirm that any parts of the Canonical books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit."

Guided by the judgment we have thus referred to we do not think the 11th charge contained in the 31st Article of Charge is so made out by the extract given from the Appellant's work as to justify us in regarding that Article of Charge as established. Mr. *Voysey* asserts, indeed, at the end of a long passage, extracted from the second volume of his Sermons, and set out in the 29th Article of Charge, that "all knowledge of God can only come from our own deep sense of what He requires us to do;" and these words are associated with much disparagement of the Bible. But it is possible to interpret these words as meaning that the Bible itself would be of no effect in imparting a knowledge of God if that deep sense of what He requires us to do were absent—a

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sense in which the expression would be allowable; and, following the example set by the judgment in the case of the "*Essays and Reviews*," we think this interpretation in a *quasi*-criminal proceeding should prevail.

As regards the remaining charges contained in the following Articles of Charge, whatever force may be given to the word "authority" in the 6th Article of Religion "as applied to the Canonical Books of the Old and New Testament," we are of opinion that, in order that the books (which are enumerated) should have any authority at all, it is not consistent with that Article of Religion for any private clergyman, of his own mere will, not founding himself upon any critical inquiry, but simply upon his own taste and judgment, to assert that whole passages of such Canonical books are without any authority whatever, as being contrary to the teaching of Christ as contained in others of the Canonical Books. We think that no private clergyman can do that which the whole Church is, by the 20th Article of Religion, declared to be incompetent to do, viz., expound one part of Scripture in a manner repugnant to another, and we need not go through the painful task of citing the numerous passages in the extracts where this is done by Mr. *Voysey*. We find whole chapters of the Gospel of St. John declared by Mr. *Voysey*, on his own simple assertion, to be irreconcilable with the other Gospels, not on points unconnected with "religious faith and duty," to use the words of the judgment in the case of the "*Essays and Reviews*," but in the most essential manner connected with both; and, again, whole passages declared to be spurious on no other ground than that they do not approve themselves to Mr. *Voysey's* taste. We can entertain no doubt then, that the charges contained in the 32nd, 33rd, and 34th Articles of Charge are abundantly established.

We have now fulfilled the duty of examining minutely the Articles of Charge exhibited against the Appellant. We have not been unmindful of the latitude wisely allowed by the Articles of Religion to the Clergy, so as to embrace all who hold one common faith. The mysterious nature of many of the subjects associated with the cardinal points of this faith must, of necessity, occasion great diversity of opinion, and it has not been attempted by the Articles to close all discussion, or to guard against varied interpre-

tations of Scripture with reference even to cardinal Articles of Faith, so that these articles are themselves plainly admitted, in some sense or other, according to a reasonable construction, or according even to a doubtful, but not delusive, construction. Neither have we omitted to notice the previous decisions of the Ecclesiastical Courts, and especially the judgments of this Tribunal, by which interpretations of the Articles of Religion, which by any reasonable allowance for the variety of human opinion can be reconciled with their language, have been held to be consistent with a due obedience to the Laws Ecclesiastical, even though the interpretation in question might not be that which the Tribunal itself would have assigned to the Article.

We have also had careful regard to the explanations given by Mr. *Voysey* himself in Court of those of his writings from which the extracts contained in the Articles of Charge have been taken, in order to see whether the extracts convey to the mind the advised and definite opinions of the author, or whether their meaning can be modified by the context in a sense more consistent with the Articles of Religion, but we cannot find any indications of such being the case.

We think that the extracts deliberately exhibit the opinions of Mr. *Voysey*, by which the Articles of Religion, with reference to original sin, the sacrifice and suffering of Christ, the Son of God, both God and man, to reconcile His Father to man, the Incarnation and Godhead of the Son, his return to judge the world, the doctrine of the Trinity, are plainly controverted and impugned, and the Holy Scriptures are as plainly denied their legitimate authority, even on points essential both to faith and duty, by the process of denying their genuineness, not on any critical grounds, but avowedly because they contradict Mr. *Voysey's* private judgment.

We have not, in this our decision, referred to any of the Formularies of the Church other than the Articles of Religion. We have been mindful of the authorities, which have held that pious expressions of devotion are not to be taken as binding declarations of doctrine. But Mr. *Voysey* will, we think, himself feel how impossible it is that any society whatever of worshippers can be held together without some fundamental points of agreement, or

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can together worship a Being in whom they have no common faith. He himself appears to have experienced the difficulty in the remarkable passages with reference to prayer in the name of Jesus Christ, extracted from the second Part of the Fourth volume of the Sermons, and set out in the latter part of the 30th Article of Charge.

The whole of the formularies of the Church, and of its devotion, are based on the faith in one God, the Father, Son, and Holy Ghost. In the daily services of the Church, both morning and evening, Glory is ascribed at the end of each Psalm to this one God in Trinity, naming each person of the Godhead separately. Prayer constantly concludes with a reference to the mediation of Jesus Christ. Direct prayer is addressed to Jesus Christ in the daily service, morning and evening, by the short prayer of "Christ, have mercy upon us." In the daily Morning Prayer, throughout a great portion of the *Te Deum*, prayer is made to the Son; and, three times in a week, in the Litany, there is direct prayer addressed both to the Son and to the Holy Ghost, as well as to the Holy Trinity. In fact a large portion of the Litany is addressed to the Son directly.

It is not surprising, then, that there should be Articles distinctly supporting devotions so fully impressed with a faith in the intercession and power of the Son who is thus invoked. And it would be as contrary to morality as to law to direct the professors of any Religion daily to offer prayer to One in whose Divine power they have no faith, or to address as God, One whom they believed to be only man.

Mr. *Voysey*, in his address to us, relied much on the absence of direct verbal contradiction in his writings to the words of the Articles of Religion, and asserted that, inasmuch as the Articles could not be all reconciled with each other, he might properly dwell on one view of an Article which, from the inconsistent character of the Articles, would be opposed to the construction of another Article.

The mode in which Mr. *Voysey* constantly misrepresents and caricatures the opinions from which he differs, no doubt accounts for his thus attributing inconsistency to statements of doctrine which he has misunderstood.

We are, on a perusal of Mr. *Voysey's* writings, driven to the conclusion, not removed by his arguments, that he advisedly rejects the doctrines on the profession of which alone he was admitted to the position of a Minister of the Church. He disclaims all wish to reconsider his avowed and published opinions, and does not desire an opportunity of retracting any of his opinions. We are bound, therefore, to advise Her Majesty that his original appeal against the admission of the Articles should be dismissed with costs, and that, on the merits of the whole case, sentence of deprivation should be pronounced against him, and that he should be condemned in the costs of the suit.

In pronouncing this decision their Lordships have assumed that Mr. *Voysey* adheres to the intimation, made by him on the conclusion of the argument, that he does not desire an opportunity of retracting the opinions which have now been condemned; but their Lordships are, nevertheless, unwilling to proceed to the last step of their duty if he do, within a week from this date, expressly and unreservedly retract the several errors of which he has been convicted.

Their Lordships would have followed the precedent afforded by Mr. *Heath's* case if Mr. *Voysey* had been present, and would have required his immediate decision; but they have been informed that Mr. *Voysey's* absence is occasioned by a sufficient reason.

In pursuance of this judgment, their Lordships reported to Her Majesty in Council that, having heard the said Rev. *Charles Voysey* and Counsel upon the questions at issue in the said principal cause, and having maturely deliberated, agreed humbly to report their opinion that the Rev. *Charles Voysey* has offended against the Laws Ecclesiastical by having, within two years preceding the commencement of the suit or proceeding against him, written and printed, published, dispersed, given, sold, and set forth, or caused to be printed and published, dispersed, given, sold, and set forth within the diocese of *London* certain works, books, or pamphlets, entitled respectively, "*The Sling and the Stone,* by *Charles Voysey,* B.A., *Saint Edmund Hall, Oxford,* Incumbent of *Healaugh*" (as in the Articles of Charge alleged) in which he has maintained or affirmed doctrines contrary and re-

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pugnant to or inconsistent with the Articles of Religion and Formularies of the said United Church of *England* and *Ireland;* and their Lordships further agreed to report that unless, within a week from this day, he (the said *Charles Voysey*) should expressly and unreservedly retract the several errors in which he has so offended, he ought by law to be deprived of all his ecclesiastical promotion, and especially of the said vicarage or incumbency and parish church of *Healaugh*, and all profits and benefits of the said vicarage or incumbency, and of any other ecclesiastical promotions whereof he may be possessed, and from the glebe, fruits, tithes, rents, salaries, and all other ecclesiastical dues, rights, and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotion, or any other ecclesiastical promotion whereof he is possessed, and that a decree ought to be issued under seal of Her Majesty in ecclesiastical and maritime causes depriving him accordingly; and further, that he (the said Rev. *Charles Voysey*) ought to be condemned in the costs incurred on behalf of *Thomas Shepherd Noble*, both in the Court below and in the appeal; and "Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of her Privy Council, to approve thereof; and whereas the said *Charles Voysey* hath declared, by a letter to the Registrar, of the 15th February, 1871, that he expressly and unreservedly re-affirms the several errors of which he had been convicted, and hath not retracted the same, Her Majesty is hereby further pleased to order, as is hereby ordered, that the sentence of deprivation be issued against the said *Charles Voysey*, and that the said report be duly and punctually observed, complied with, and carried into execution. Whereof all persons whom it may concern are to take notice and govern themselves accordingly."

Solicitors for Mr. *Noble; Shaen & Roscoe.*
Proctors for Mr. *Voysey: Moore & Currey.*

JOHN MARTIN . . . . . APPELLANT;

AND

THE REV. ALEXANDER HERIOT MACKONOCHIE . . . . . RESPONDENT.

J. C.*
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Nov. 16, 18.

IN A CAUSE AND APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Monition—Disobedience to—Motion to enforce.

Motion against the Respondent, the Perpetual Curate of the parish of *St. Alban's, Holborn*, for disobedience to a Monition founded upon an Order in Council, which ordered him (amongst other things) to abstain for the future "from the elevation of the Cup and Paten during the administration of the Holy Communion, and from kneeling and prostrating himself before the consecrated Elements during the prayer of Consecration;" in that he knowingly and habitually sanctioned the elevation of the Cup and Paten above the head of the Officiating Clergyman in the prayer of Consecration, and knowingly and habitually sanctioned kneeling and prostration during the prayer of Consecration. It appeared that the ordinary course pursued in the administration of the Holy Communion in the Respondent's Church was for the Officiating Clergyman, on reaching the words of institution in the prayer of Consecration, to drop his voice so as to be nearly inaudible; that he then elevated (not the Paten but) a large wafer bread, and replacing it upon the Communion Table, bowed his head down towards the Table, and remained some seconds in that position; that he then elevated the Cup so that the rim was some inches above his head, and replacing it on the Table bowed as before, after which the administration of the Elements commenced:—*Held*, by the Judicial Committee, that such elevation of the wafer was equivalent to an elevation of the Paten, the elevation which is unlawful being that of the consecrated Bread itself, and not the Paten in which it is placed; that the bowing of the head in the manner described at the prayer of Consecration, though without bending the knee, was a prostration before the consecrated Elements, whereof the sanctioning was a disobedience of the Monition, and the Order in Council for such disobedience to the Monition; and the Respondent ordered to be suspended from the discharge of all clerical duties and offices and the execution thereof for the space of three calendar months.

Semble, as the 28th of the Articles of Religion prohibits all elevation of the Elements, by declaring, that "The Sacrament of the Lord's Supper was not by Christ's Ordinance reserved, carried about, lifted up, or worshipped;" it is not necessary to article and describe a particular elevation during the prayer of Consecration, but sufficient to state and prove that such elevation occurred during the administration of the Holy Communion.

THIS was a motion to enforce obedience to a Monition under the seal of Her Majesty's Court of appeals in Ecclesiastical causes,

* *Present*—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK, and LORD CHELMSFORD.

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which had been served on the Respondent, the Rev. *Alexander Heriot Mackonochie,* in a cause lately depending in the Arches Court of *Canterbury,* and on appeal before Her Majesty's Judicial Committee of the Privy Council, admonishing him "to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion, and from the use of Incense, and from the mixing water with the wine during the administration of the Holy Communion, and from kneeling and prostrating himself before the consecrated Elements during the prayer of Consecration, and also from using lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light."

Affidavits were filed to the effect, that the Respondent had not complied with the Monition: as he continued, first, to elevate the Cup and Paten during the administration of the Holy Communion; secondly, to kneel and prostrate himself before the consecrated Elements during the Prayer of Consecration; and, thirdly, to use lighted Candles on the Communion Table at times when such lighted Candles were not wanted for the purpose of giving light.

A motion was made to the Judicial Committee of the Privy Council on the 2nd of December, 1869 (1), to enforce the Monition in such manner as to their Lordships might seem meet. On the 4th of December, 1869, the Judicial Committee having heard Mr. *Mackonochie* in person, and Counsel on behalf of the Appellant; declined to pronounce that he had not obeyed the Monition in respect of the first and third of the matters alleged, for the reasons stated in their Lordships' judgment (2); but in respect of the second of the matters alleged, pronounced as follows, viz. (3), "That the said *Alexander Heriot Mackonochie* had not obeyed the Monition which had been served upon him, and whereby he was, amongst other things, commanded to abstain for the future from kneeling before the consecrated Elements during the prayer of Consecration; monished him to abstain therefrom for the future, and condemned him in the costs of the proceedings."

Notwithstanding these proceedings the Respondent continued

(1) Law Rep. 3 P. C. 52. (2) Ibid. 59. (3) Ibid. 71.

to disobey the Monition, by knowingly and habitually sanctioning the elevation of the Paten and Cup above the head of the officiating Clergyman in the prayer of Consecration during the administration of the Holy Communion, such elevation being then practised by his Curates and other Clerks in Holy Orders, when officiating and saying such prayer in his place and stead, and in his presence, in the Church of which he was Incumbent; and he also knowingly and habitually sanctioned kneeling or prostration before the consecrated Elements, during such prayer, by his Curates and other Clerks in Holy Orders, when so officiating, and saying such prayer.

These violations of the Monition were deposed to by several witnesses, who, in their affidavits, described the proceedings they had on various occasions witnessed, and from whose depositions the ordinary course pursued in the administration of the Holy Communion in the Respondent's Church appeared to be, for the principal Officiating Clergyman, when he came to that part of the Office for the Administration of the Holy Communion which immediately follows the prayer, known as the Prayer of humble Access, being the part where the Consecration Prayer is to be read, to lower his voice so as to become indistinct, and only audible as a kind of murmur by the greater part of the congregation, and that while he was thus indistinctly speaking, or making a brief and momentary pause, a bell began to toll, and the following actions and circumstances took place:—the officiating Clergyman paused, and then bowed down over the Holy Table, and then knelt down with his hands resting thereon, and on rising elevated, either the Paten, or what appeared to be, and was, a large wafer bread, about three inches above the level of his head, and on replacing it on the Holy Table, again bowed and knelt down as before, and after a short interval he similarly raised the Chalice or Cup, so that the rim thereof was about three inches above his head, and immediately after replacing the same on the Holy Table knelt down upon both knees and bowed his head below the level of the top of the Holy Table, and on rising, after a short pause, proceeded with the administration of the Holy Communion.

In consequence of such practices being so sanctioned by the Respondent; notice of an intended application to the Judicial

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Committee to enforce the due observance of the Monition was served on the Respondent, and a case was lodged in the Council Office containing the particulars of such acts of disobedience to the Monition.

This case, together with the affidavits above referred to, with notice of the intended motion thereon, was served on the Respondent, who did not appear; but after a considerable delay, and application to fix a day for the hearing, he filed counter affidavits made by himself, his Curates, and others, which in no respect contradicted, though they purported to explain, the practices deposed to and alleged against him. The Appellant filed a supplemental case, with affidavits in reply to those filed by the Respondent, and gave notice of his intention at the hearing of the Motion to apply to be allowed to examine *vivâ voce*, in open Court, the witnesses who had made affidavits in support of his case, and to cross-examine the Respondent and the witnesses who had made affidavits on his behalf.

Mr. *A. J. Stephens*, Q.C., Mr. *Archibald*, and Mr. *B. Shaw*,

Now moved, on behalf of the Appellant, that the Monition might be further enforced, and, after stating the particular instances of disobedience on the part of the Appellant to the Monition, and reading the affidavits in support thereof; they applied that the Respondent (who still abstained from appearing) and his witnesses, who had made affidavits, might be specially summoned, and that the Appellant's Counsel might be at liberty to cross-examine the Respondent and such witnesses.

THEIR LORDSHIPS, after consideration, allowed the application, with liberty to the Respondent to apply in like manner to cross-examine the Appellant's witnesses if he should be so advised.

Summonses were therefore served on the Respondent and his witnesses for their attendance on a day named for that purpose. The Respondent thus summoned appeared, and was examined upon his own affidavit as to the alleged practice of elevating the Cup and Paten, and prostration before the consecrated Elements during the prayer of Consecration; and regarding his allowing and sanctioning his Curates, and other officiating Clergymen

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in his Church, in his presence, to do the same. The substance and effect of such cross-examination is fully stated in the judgment delivered by their Lordships. The Respondent alone was cross-examined, the other witnesses not being called by the Appellant's Counsel, nor were any of the Appellant's witnesses cross-examined by the Respondent.

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Judgment was reserved and now delivered by

LORD CHELMSFORD:—

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This is an application against the Rev. *Alexander Heriot Mackonochie*, perpetual Curate of the Parish of *St. Alban's, Holborn*, for disobedience to a Monition founded upon an Order in Council of the 19th of January, 1869, by which he was commanded (amongst other things) to abstain for the future "from the elevation of the Cup and Paten during the administration of the Holy Communion,—and from kneeling or prostrating himself before the consecrated Elements during the prayer of Consecration." A previous application for disobedience to the Monition in these particulars was made against Mr. *Mackonochie*, upon which their Lordships expressed an opinion, that the Monition had been disobeyed with reference to kneeling during the prayer of Consecration, and condemned him in costs. Upon that occasion their Lordships explained the way in which the Article of charge with respect to the elevation of the Cup and Paten came to be worded as it was. The Article, as it was originally framed, was objected to as vague and general, and was ordered to be reformed. The Article, as reformed, charged Mr. *Mackonochie* with having elevated the Paten and the Cup above his head during the prayer of Consecration It was quite unnecessary to charge an elevation of the Paten and the Cup to the extent described in the reformed Article, because the 28th of the Articles of Religion prohibits all elevation of the elements, declaring that "the Sacrament of the Lord's Supper was not by Christ's Ordinance reserved, carried about, lifted-up, or worshipped." So the elevation of the Paten and Cup need not have been charged to have taken place during the prayer of Consecration. It would have been sufficient to have stated it to have occurred during the administration of the Holy Communion. But the charge having been thus precisely framed (however unneces-

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sarily), the specific offence to be proved against Mr. *Mackonochie* was not simply an elevation of the Cup and Paten, but an elevation of them above his head at the particular period of the administration when the prayer of Consecration was being read. Upon the original hearing before the Dean of the Arches, he pronounced that Mr. *Mackonochie* had offended in the terms of this Article, and monished him to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion as pleaded in the Articles. There was no appeal from this part of the sentence. In the Monition which followed the appeal to this Committee from the rest of the sentence of the learned Judge of the Arches Court, Mr. *Mackonochie* is commanded to abstain from the elevation of the Cup and Paten during the administration of the Holy Communion; but upon the former application against Mr. *Mackonochie* for disobedience to this Monition, their Lordships were of opinion, that the words "as pleaded in the Articles," must be understood as being in the Monition, and, therefore, that the prohibited elevation was confined to the degree and the time charged in the Article. The unnecessary particularity in the wording of this Article of charge afforded Mr. *Mackonochie* the opportunity, of which he availed himself, to obey the Monition to the letter, and still to continue to elevate the Cup and Paten during the administration of the Holy Communion, but not above his head, nor during the prayer of Consecration.

Their Lordships were, therefore, compelled, upon the evidence produced upon the former application against Mr. *Mackonochie*, to come to the conclusion, that he had not disobeyed the Monition in this respect, but they took care "to have it distinctly understood that they gave no sanction whatever to a notion that any elevation of the Elements, as distinguished from the mere act of removing them from the Table and taking them into the hand of the Minister, was sanctioned by law." Upon another charge of disobedience to the Monition, Mr. *Mackonochie* was not so successful, as upon the former occasion, as in protecting himself by a supposed literal compliance with its terms. He was commanded not to kneel or prostrate himself before the consecrated Elements during the prayer of Consecration. He admitted that it was his practice during the prayer of Consecration reverently to bend one knee at

certain parts of the Prayer, and that occasionally in so doing his knee momentarily touched the ground, but that such touching of the ground was no part of the act of reverence intended by him. And he contended that this genuflection, unless the knee reached the ground, was not kneeling. Their Lordships, however, expressed a clear opinion, that bowing the knee in the manner described by Mr. *Mackonochie* was kneeling, and that it was not necessary a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Their Lordships thought it right, upon that occasion, to express a hope that Mr. *Mackonochie* would learn that a mere literal compliance with the Monition in a merely evasive manner would not suffice. And they observed, that literal compliance with regard to the actual limits of the Order was of course all that he was held to by law; and for obedience to the spirit of the Order they could only trust to his own feelings and his own conscience.

Mr. *Mackonochie* is now again before their Lordships upon complaint of acts of disobedience to the Monition similar to those with which he was charged upon the former occasion.

The Appellant prays their Lordships to declare, that Mr. *Mackonochie* has not complied with the Monition, inasmuch as, first, he knowingly and habitually sanctions the elevation of the Paten and Cup above the head of the Officiating Clergyman in the prayer of Consecration; and secondly, that he knowingly and habitually sanctions kneeling or prostration before the consecrated Elements during the prayer of Consecration.

The Affidavits filed on behalf of the Appellant describe the acts done by the Officiating Clergyman during the administration of the Holy Communion upon seven different Sundays in the months of December, 1869, and January and February, 1870. As the Affidavits on the other side do not deny the general correctness of the account of what took place upon these occasions (nor did Mr. *Mackonochie* in his cross-examination), it may be assumed that they describe what is the ordinary course pursued in the administration of the Holy Communion in the Church of *St. Alban's*. It appears, then, that the practice is that, upon the officiating Clergyman reaching the solemn words of Institution in the prayer of Consecration, he drops his voice so as to be nearly inaudible,

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and a Bell begins to toll; that he then elevates (not the Paten, but) a wafer, and replacing it upon the Communion Table bows his head down towards the Table and remains for some seconds in this position; that he then elevates the Cup, and replacing it on the Table bows down as before, after which the administration of the Elements commences.

The Appellant alleges, that on the days mentioned in the affidavits which he has filed, the Paten and Cup were elevated above the head of the officiating Clergyman during the prayer of Consecration; and that during the same prayer there was kneeling or prostration before the consecrated Elements.

To begin with his case as to the elevation of the Cup and Paten, the Appellant has distinctly proved that, upon each of the seven Sundays mentioned in the Affidavits, the officiating Clergyman during the prayer of Consecration elevated a large wafer bread above his head, and also during the same prayer elevated the Cup, so that its rim was some inches above his head. These statements are opposed by the Affidavits of the Clergymen who officiated upon the several Sundays mentioned in the Appellant's Affidavits. Mr. *Howes*, who was the officiating Clergyman on four of the Sundays, denies that, on either of those days, he raised or elevated the Paten or Chalice above his head during the prayer of Consecration, and adds that he had not consciously, nor to the best of his knowledge, done so since the practice was discontinued by Mr. *Mackonochie* after the 30th of December, 1866. Mr. *Stanton*, who officiated on Sunday, the 26th of December, 1869, swears that he did not intentionally elevate the Paten or Cup above his head in the Prayer of Consecration; and Mr. *Willington*, who officiated on two of the Sundays, states positively that he did not elevate the Paten or Cup above his head in the prayer of Consecration. It is to be observed that these Affidavits might, according to a possible view entertained by the Reverend Gentlemen, be regarded by them as literally true, because the Paten was not elevated by them but a wafer bread, and the whole of the Cup was not raised above the head, but only the upper part of it. It appears from the cross-examination of Mr. *Mackonochie* that, after the institution of proceedings against him, he introduced the practice of elevating the wafer and not the Paten. As he has confessed that his object

upon every occasion has been merely to comply literally with the law, it was not unfair to presume that the change from the Paten to the wafer was made in order that he might not be accused of elevating the Paten. But Mr. *Mackonochie* stated to their Lordships (and they accept his statement) that "he has in no way sheltered himself behind the difference between the wafer and the Paten, but has treated the wafer as the Paten, and considered the elevation of the wafer as equivalent to the elevation of the Paten." It is sufficient, therefore, to say that if any such distinction had been attempted, it could not have been successful, as the elevation which is unlawful is that of the consecrated Bread itself, and not of the Paten in which it is placed.

Again, there can be no doubt that the elevation of any part of the Cup above the head is an elevation to that extent of the Cup itself. This Mr. *Mackonochie* very properly admitted in his cross-examination. He said, "The Cup is the whole Cup; to raise any part of the Cup above the forehead is to raise the Cup above the forehead."

Now, the conclusion to be drawn from this state of facts is, that Mr. *Mackonochie*, having determined to yield the merest literal obedience to the precise letter of the Monition, had resolved that neither he nor his Curates should elevate the Paten or the Cup above their heads during the prayer of Consecration; but, in consequence of the difficulty of keeping to the exact degree of elevation intended, the officiating Clergyman unconsciously and unintentionally elevated the wafer and the Cup to the extent mentioned in the affidavits. But if Mr. *Mackonochie* has been (as he admitted) "carefully scanning the Monition and the Order in Council to see how he could keep exactly within them," and has been acting upon his understanding "that legal judgments should be interpreted according to their letter," he has no right to complain if the letter of the Monition is applied against him, and he is made accountable for an actual noncompliance with its terms, whatever his intentions to obey it may have been. The act of elevation to the prohibited degree was witnessed; the secret intention could not be known. That the elevation charged took place during the prayer of Consecration appears from the evidence of Mr. *Mackonochie* that the raising of the wafer and of the Cup takes

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place after the words of institution in each kind; consequently, the wafer, at least, must be raised as the prayer is proceeding.

The remaining charge to be considered against Mr. *Mackonochie* is, his sanctioning kneeling or prostration before the consecrated Elements during the prayer of Consecration. Their Lordships (as already mentioned) having upon the former occasion, when Mr. *Mackonochie* was charged with disobedience to the Monition, decided that the genuflection which he practised amounted to kneeling, Mr. *Mackonochie,* with the same object which he has always had in view, to pay only the closest literal obedience to the Monition, gave notice to his Curates that he intended thenceforth to bow without bending the knee at the part of the prayer of Consecration where he had previously knelt. This intention he and his Curates carried out, according to the description given in the affidavits, by bowing down towards the Table after replacing the wafer upon it, and remaining some seconds in that position, and adopting the same course with respect to the Cup. Mr. *Mackonochie* stated that upon some of these occasions his forehead may have touched the Table, but that this was no part of the act of bowing, his object being merely a low bow. Their Lordships do not regard a reverential bow in the light of an act of prostration, as contended for by the learned Counsel for the Appellant; but the posture assumed and maintained for some seconds by Mr. *Mackonochie* is certainly not a mere bow, but a humble prostration of the body in reverence and adoration. Their Lordships consider that the charge against Mr. *Mackonochie,* of sanctioning prostration before the consecrated Elements, is therefore fully proved.

Their Lordships cannot refrain from expressing their great regret at the course which Mr. *Mackonochie* has thought himself justified in adopting in his proposed submission to the authority of the Monition. He has (as he admitted in his cross-examination) "carefully scanned the Monition and the Order in Council, to see how nearly he could preserve the prohibited ceremonies, or," as he expressed it, "how far he could obey the law of the Church" (or what he chooses to consider the law of the Church) "without disobeying the law of the State."

Mr. *Mackonochie* must be reminded that the right of the Church

of *England* to ordain ceremonies is asserted by the 34th of the Articles of Religion, to which he has given his assent, and that none of the ceremonies which he practises are prescribed by the Church.

In the attempt to satisfy his conscience, and to shelter himself under the narrowest literal obedience to lawful authority, Mr. *Mackonochie* has been a second time foiled. Upon the former occasion their Lordships, after expressing their opinion judicially that the Monition had been disobeyed, did not think it necessary to do more to mark their disapprobation of Mr. *Mackonochie's* course of proceeding than by directing that he should pay the costs of the application. Upon this repetition of his offence, their Lordships think that they ought to proceed further. They, therefore, declare that Mr. *Mackonochie* has not complied with the Monition in respect of the elevation of the Paten or wafer, nor as to abstaining from prostration before the consecrated Elements. And they order that he be suspended for the space of three calendar months from the time of notice of the suspension, from all discharge of his clerical duties and offices, and the execution thereof: that is to say, from preaching the word of God, and administering the Sacraments, and celebrating all other clerical duties and offices; and further, that he pay the costs of this application.

The following Order, dated the 25th of November, 1870, was drawn up and issued in pursuance of their Lordships' judgment:—

"The Lords of the Committee having maturely deliberated, pronounced that the Reverend *Alexander Heriot Mackonochie*, Clerk, Incumbent, and perpetual Curate of the new Parish of *Saint Alban's, Holborn*, in the County of *Middlesex*, Diocese of *London*, and Province of *Canterbury*, the Respondent, had not obeyed the Monition which had been duly served upon him, bearing date the 19th day of January, 1869, more especially in not having abstained from the elevation of the Paten during the prayer of Consecration in the Order of the administration of the Holy Communion, and from prostrating himself before the consecrated Elements during the prayer of Consecration, and their Lordships accordingly ordered that for such his disobedience he, the said

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Reverend *Alexander Heriot Mackonochie*, be suspended for the space of three months, from and after this day, from the discharge and execution of all the functions of his Clerical office, that is to say, from preaching the word of God, and administering the Sacraments, and performing all other duties of such his Clerical office, and their Lordships directed that a Decree of suspension be issued; suspending him accordingly, and that the same be published by affixing a copy thereof on or near the Door of the Church of the said new parish of *Saint Alban's*, on Sunday next, the 27th day of November, 1870, as also by personally serving it upon the said Reverend *Alexander Heriot Mackonochie*. Their Lordships did further condemn the said *Alexander Heriot Mackonochie* in the costs incurred by the Appellant in these proceedings." (1)

Proctors for the Appellant: *Moore & Currey.*

(1) Instances of proceeding by Monition for contempt and of suspension, and deprivation by the Ecclesiastical Courts and the Court of Delegates, are to be found in a "Return of appeals in causes of Doctrine or Discipline made to the High Court of Delegates from its erection by 35 Hen. 8, c. 19, A.D. 1533, until its abolition by the 2 & 3 Will. 4, c. 92, A.D. 1832;" ordered by the House of Commons to be printed, 3rd of April, 1868.—P.P. No. 199; Nos. 2, 10, 13, 15, 16, 30, 47, 48, 50, 59, 63, 73, 80, 93, 96, 98, 104, 105, 134, 135, 136, and 178; Ib. pp. 2 to 100. The powers of the High Court of Delegates were transferred to Her Majesty in Council by the 3 & 4 Will. 4, c. 92, s. 3. The power of Her Majesty in Council, acting by the advice of Her Judicial Committee, to punish contempts, and to enforce judgments, decrees, or orders, is specially given by 3 & 4 Will. 4, c. 41, s. 28, and subsequently in causes Ecclesiastical and Maritime by the 6 & 7 Vict. c. 38, s. 7.

In re CLARK'S PATENT.

J. C.*
1870
Nov. 26
Dec. 5.

Letters Patent—Application by Patentee for prolongation of term—Averments in petition—Account of profits by Petitioner.

A Petitioner, seeking the grace and favour of the Crown, in applying for an extension of the term of Letters Patent, is bound to bring his accounts before the Committee in such a shape as to leave no doubt, what the remuneration has been that he has received from the Patent.

The petition for extension, and the accounts furnished by the Petitioner (the Patentee) not containing sufficiently full and accurate information in respect to the Patent, or the remuneration received by him, the Judicial Committee declined to recommend a prolongation of the term.

The principle, where the statement of the remuneration received by the Patentee, is on the face of the petition and accounts filed unsatisfactory, of adjudicating without reference to the merits of the invention, as acted on in *In re Saxby's Patent* (1), recognised.

THE Patentee applied for an extension of the term of two Letters Patent granted to him respectively on the 19th of January, 1857. The first Patent was for an invention entitled "Improvements in floating docks." The second Patent was for "Improvements in machinery or apparatus for raising Ships out of the water for the purpose of examination and repairs." In the petition it was stated, that the two Patents had been used and worked together, and, for all practical purposes, might be considered as one invention for docking, raising, and repairing Ships.

In the petition it was alleged, that a Company was formed in 1857, called the *Thames Graving Dock Company*, to which the Petitioner subscribed, and from which he was to receive a royalty, but that the Company was wholly unsuccessful, and the Petitioner never received any royalty; that the Company was afterwards reformed under the title of the *Victoria Graving Dock Company, Limited*, to which the Petitioner subscribed £4,000, and by an Indenture, dated the 10th of July, 1866, made between the Petitioner of the one part and the Company on the other, the

* *Present*:—SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

(1) *Ante*, p. 292.

J. C. 1870 *In re* CLARK'S PATENT.

Petitioner, in consideration of 150 shares of £25 each in the Company, representing the sum of £2,750, and also of the royalty of £5 per cent. upon the sum of £12,000, being the cost of Pontoons erected by the Company, in accordance with the invention, and of a further royalty of £5 per cent. upon the actual cost of such other Pontoons, and apparatus, and machinery connected therewith, constructed by the Company under the terms of the deed, granted to the Company exclusive licence to use his invention upon the above terms during the continuance of the Patents; that the total amount received by the Petitioner in respect of the dividends upon the shares in the Company, and for royalties paid under the licences granted to the Company by the above deed, in the whole amounted to the sum of £1,762. 18*s.*, and no more; that the Petitioner in respect of the £4,000 share capital so subscribed by him in the *Thames Graving Dock Company*, upon the formation of the *Victoria Graving Dock Company* received eighty ordinary shares of £25 each in that Company, credit being given to him in the Books of the Company for £12. 10*s.* per share as having been paid thereon, amounting to the total sum of £1,000, and that the Petitioner had since received dividends thereon amounting to the sum of £210, being the total interest received upon the above sum of £4,000; that the Petitioner had received from the Government of *India* the sum of £2,000 for liberty to construct and use floating Docks and machinery, in accordance with his Patent inventions, and which were being completed under the directions of the Petitioner at a cost of £180,000, but that the Government refused to pay him any royalty for the use of the invention, and the above sum of £2,000 was the only sum received by him in respect thereof; that the above particulars comprised the whole of the receipts and dividends derived by the Petitioner by way of remuneration for his Patent invention; that the Petitioner had devoted great labour and expended large sums on such Docks, but that no other Docks, except those before mentioned, had been completed, although the Petitioner has every reason to believe his invention is greatly approved, and was likely to be shortly adopted at *Malta* and other places, and that he had made surveys for the Government for Docks at *Portsmouth*, and elsewhere, but had received no remuneration in respect thereof: That the pay-

ments and disbursements made by the Petitioner in respect of his patented inventions, including Law charges, Clerks' salaries, travelling and other expenses incidental and relating thereto, exceeded the sum of £7,000. That the Petitioner's invention required great time to be made known and appreciated, and that the cost of the works and apparatus had, no doubt from the slackness of commercial enterprise during the last few years, prevented it being adopted to a greater extent than it would otherwise have been, but that if an extension of the term were granted for the patented article for a period of seven years from the expiration of the existing term he would during such extension receive a reasonable remuneration for the labour bestowed and expenses incurred by him on his invention, and which he had hitherto failed to obtain.

Sir *John Karslake*, Q.C., and Mr. *Bidder*, for the Patentee.

Witnesses were examined, and evidence given of the merit and practical value of the invention. Upon the accounts, the Patentee's Clerks were examined, but the result of the charges for the working of these Patents, and the remuneration received by the Patentee for the Patents being, as their Lordships thought, unsatisfactory in respect to the contract for Docks at *Malta*, the hearing was adjourned, and the Petitioner himself afterwards examined on that point. The effect of the evidence is stated in their Lordships' judgment.

Mr. *Archibald*, for the Crown,

Objected to the accounts, which he submitted were unsatisfactory. It had been held by this Tribunal that the question of accounts was a preliminary inquiry, however great the merits: *In re Saxby's Patent* (1).

THE LORD JUSTICE JAMES:—

This is an application for the prolongation of two Patents, one for "Improvements in machinery or apparatus for raising Ships out of the water for the purposes of examination and repair," the other for "Improvements in floating docks." The invention, how-

(1) *Ante*, p. 292.

J. C. 1870 *In re* CLARK'S PATENT.

ever, is substantially one, and is an ingenious idea, skilfully worked out, of applying the power of the hydraulic press to the lifting of Ships in deep water, and placing them on a Pontoon or float much wider than the Ship's keel. The weight of the Ship being thus distributed over a much wider area, the immersion is proportionately reduced, so that a Ship of the largest dimensions may be thus lifted and then floated into a bay or basin, or sheet of comparatively shallow water which would serve the purposes of a graving dock. By increasing the number of Pontoons or floats, and the number or area of such shallow bays or basins, or sheets of water, any number of graving docks may be obtained for Ships of any size by the use of one of the patented machines.

To the merit, the originality, and value of the invention, engineering evidence of great weight has been adduced, and their Lordships have no reason to doubt this evidence. The invention, however, if not wholly, has not been unsubstantially, remunerated. It is in evidence that the Patentee has received or is to receive in money, or in money's worth, the following remuneration, viz.:—Royalty from *Victoria Graving Dock Company*, £600; paid-up shares in a thriving Company, of the nominal value of £3,750; paid by Indian Government, £2,000; Five per cent. on the amount of expenditure on works in course of execution at *Malta*, the contract price for which is £90,377. Against this the Petitioner has sought to set off very large sums, but sums stated and proved merely as estimates. The largest of them, £2,000, is stated thus:—By travelling, office, printing, and incidental expenses, for proposed patent Docks at *Portsmouth, Vancouver Island, Bermuda, Marseilles, Bordeaux, Taranto, Brindisi, Brest, Constantinople, Amsterdam, Rio Janeiro, Melbourne, Liverpool, Falmouth, Lisbon, Genoa, Cuba, Jamaica, Calcutta, Barcelona, Cadiz*, &c., in respect of which no separate accounts have been kept, but the total of which exceeds £2,000; being, in fact, that proportion of the general expenses of the Petitioner's office and staff of Assistants in his profession of a Civil Engineer which he considers fairly attributable to his efforts to establish docks on his system at the several places mentioned.

How far their Lordships would consider this kind of expenditure in attempts hitherto unsuccessful at several places, to procure the

outlay of large sums of money, on the construction of docks on which large commissions or royalties would enure to the Patentee, as legitimately to be set off against the profits actually received, their Lordships do not think it necessary to express any decisive opinion. It is obvious, however, that such an expenditure might be carried to an unlimited extent, or limited only by the means, the activity, and the temperament, more or less sanguine, of the Patentee. And, it is further possible, and even probable, that in some of the places the Patentee's invention may still be adopted, and that to him as a Civil Engineer or projector his plans and estimates may yet bring in sufficient remuneration.

But their Lordships have for their guidance principles laid down by their predecessors at this Board, and they conceive it to be of vital importance in dealing with applications of this kind to adhere to any principle once clearly established. In a recent case, *Saxby's Patent* (1), it was laid down by this Board in a judgment delivered by Lord *Cairns*, thus: "It is the habit of this Tribunal to consider whether the invention brought before them is one of that high degree of merit which, if everything else were satisfactory, would entitle the Patentee to a prolongation. But in the present case, as I have already stated, their Lordships propose to deal with that which is at the very threshold of the case, the question of accounts. Now, it is the duty of every Patentee who comes for the prolongation of his Patent, to take upon himself the *onus* of satisfying this Tribunal in a manner which admits of no controversy, of what has been the amount of remuneration which, in every point of view, the invention has brought to him, in order that their Lordships may be able to come to a conclusion, whether that remuneration may fairly be considered a sufficient reward for his invention, or not. It is not for this Committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast; it is for the Applicant to bring his accounts before the Committee in a shape which will leave no doubt as to what the remuneration has been that he has received." Their Lordships entirely concur in, and feel themselves bound by, this decision, and to hold that the accounts in this case are not presented in such

(1) *Ante*, p. 294.

J. C. 1870

In re CLARK'S PATENT.

a manner as to enable them to pronounce that the Petitioner has not received a sufficient remuneration.

This case is, moreover, stronger than *Saxby's Patent* (1) in this—that neither in the accounts nor in the petition is the profit on the *Malta* works in any way alluded to. The only reference to the *Malta* works in the petition is in the following passage:—"He has every reason to believe that his system is greatly approved, and will very shortly be adopted at *Malta* and other places,"—that petition having been presented in May last, and the actual contract for the works having been made on the 24th of August, 1869. And in the petition, having enumerated other receipts, there is the following statement: "That the above particulars comprise the whole of the receipts and advantages derived by your Petitioner by way of remuneration for his said patented invention." A Petitioner seeking the grace and favour of the Crown is bound to strict truth and to the utmost candour and frankness, to *uberrima fides*, in his statement. Their Lordships were so struck with the apparent want of candour in dealing with the *Malta* contract in the petition and accounts, although it was opened by Counsel, that they have thought it right to give the Petitioner an opportunity of further examination and explanation. And although their Lordships are willing to acquit the Petitioner of any intention to deceive them, yet they are bound to hold that the petition and accounts do not contain the full and accurate information which the Crown, the public, and their Lordships were entitled to have. The Petitioner himself has accordingly been this morning examined, but upon the whole consideration of the case their Lordships feel, that they cannot recommend Her Majesty to grant the prolongation asked for, or any other prolongation.

Solicitor for the Petitioner: *C. Morgan.*
Solicitors to the Treasury, for the Crown.

(1) *Ante*, p. 292.

IN THE MATTER OF THE PETITION OF THOMAS KENNEDY RAMSAY.

J. C.*
1870
Nov. 26.

ON PETITION FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.

Lower Canada—Consolidated Statutes, ch. 77—Jurisdiction—Alleged Contempt of Court—Fine—Writ of Error—Practice—Appeal—Reference by the Crown under sect. 4 of 3 & 4 Will. 4, c. 41.

Whether an appeal lies to the Queen in Council against a judgment of the Court of Queen's Bench in *Lower Canada*, quashing a writ of Error against an Order of the Court of Queen's Bench on the Crown side, fining and ordering an attachment against a Counsel for an alleged contempt of Court—*quære.*

Semble, where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee, under the Statute, 3 & 4 Will. 4, c. 41, s. 4.

A Judge of the Court of Queen's Bench in *Lower Canada*, whilst sitting alone in the exercise of the Criminal jurisdiction, has, under the authority conferred on him by sect. 72 of ch. 77 of the Consolidated Statutes of *Canada*, no power to pronounce a Counsel in contempt for publishing two Letters reflecting upon the conduct of such Judge, or to impose a fine.

THE facts and circumstances of the case, as they appeared on the petition, were, in substance, as follows:—

The Petitioner was a Queen's Counsel practising at *Montreal*, in the Province of *Lower Canada*, and for about three years previously he had conducted the Crown business before the Court of Queen's Bench, for and by the appointment of the Attorney-General of *Lower Canada*.

On the 24th of August, 1866, the Petitioner appeared before Mr. Justice *Drummond*, one of the Judges of the Court of Queen's Bench for *Lower Canada*, to oppose, on behalf of the Attorney-General, an application for a writ of *Habeas Corpus* made by Counsel on the part of a Prisoner named *Lamirande*, who had been arrested under the provisions of the Extradition Treaty between *Great Britain* and *France* for an alleged forgery said to have been committed at *Poitiers*, in *France*. The offence of which *Lamirande* was alleged to have been guilty was that of making false entries in the Books of a Bank at *Poitiers*, and it appeared

* *Present*:—SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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that this offence was forgery by the law of *France*. It was contended, that it was not forgery by the law of *Great Britain*, and, therefore, that the offence was not within the Treaty.

Mr. Justice *Drummond* adjourned the application. Being pressed the same evening by the Counsel for *Lamirande*, who attended at Mr. Justice *Drummond's* house for the purpose, to issue the writ lest the Prisoner should be taken away in the meantime, the learned Judge still declined to issue the writ, but gave the Gaoler a written order not to part with *Lamirande* until he should have given a decision upon the application for a *Habeas Corpus*.

After the Judge had left such Order with the Gaoler, the French Police Officers arrived at the gaol with the Governor-General's warrant in proper form and properly authenticated. The Gaoler thereupon handed over the Prisoner to the French Police Officer named in the warrant, and before the next morning that Officer had removed the Prisoner out of the Canadian jurisdiction.

The Petitioner stated, that he had nothing whatever to do with the removal of the Prisoner. On the contrary, when the matter of the writ was under discussion before the Judge on the previous afternoon, the Counsel for the Prisoner had made an observation to the effect that there was danger of the Prisoner being "kidnapped" before the morning, whereupon the Petitioner replied, that the only danger he was in was that before the morning the French authorities might arrive with the proper authority for taking him away, in which case, the Petitioner observed, the Gaoler would be bound to give him up. The Petitioner had no control over the proceedings of the prosecution or of the French Police Officers. The prosecution was represented by Mr. *Pominville*, an Advocate, and the Petitioner appeared merely on the instructions of the Attorney-General, and as his representative.

On the following morning, after the Prisoner was gone, Mr. Justice *Drummond* issued his writ of *Habeas Corpus*, to which the Gaoler returned the warrant of the Governor-General, and also the written Order given him by the Judge as before mentioned. On the same day Mr. Justice *Drummond* made some remarks at Chambers on the subject of the removal of *Lamirande*, in the course of which he reflected very severely upon persons whom he did not name, and, among other observations, said: "I must say

that everything was said to induce both the Counsel for the Prisoner and myself to believe that no attempt would be made to remove the man from gaol." The Petitioner then answered that what he had said was, that there was only one way in which he could be removed, and that was by the Governor-General's warrant. The remarks of the Judge were reported in the *Montreal Herald* of the 27th of August, 1866, and the Petitioner, having no doubt that the learned Judge's remarks were generally understood as reflecting upon himself as well as others, addressed to the Editor of the *Montreal Gazette* a Letter in reply to the strictures of Mr. Justice *Drummond*, which Letter contained comments and strictures reflecting on that Judge's proceedings.

On the 27th of August, 1866, Mr. Justice *Drummond* adjourned the matter of the writ of *Habeas Corpus* to the next day, the 28th, on which day he delivered a written judgment. This judgment again reflected severely on persons not named, but amongst whom the Petitioner felt convinced he was meant and pointed at. It was so understood by the profession and the public at large. Amongst other passages, the judgment contained the following: "That Gentleman" (meaning Mr. *Doutre*, the Counsel for the Prisoner) "was, no doubt, lulled into a sense of false security by the indignation displayed by the Counsel for the Crown when Mr. *Doutre* signified to me his apprehension that a *coup de main* was in contemplation to carry off the Petitioner before his case had been decided." . . . "The Petitioner has been swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice which has yet been heard of in *Canada*." . . . "As to the public Officers who have been connected with this matter, if any proceedings are to be adopted against them they will be informed thereof on Monday, the 24th of September next, in the Court of Queen's Bench holding criminal jurisdiction, to which day I adjourn this case for further consideration."

On the following day, the 29th of August, 1866, the above judgment was reported in the *Montreal Herald*, and the Petitioner, on the same day, addressed to the Editor of the *Montreal Gazette* a Letter in reply to the strictures of Mr. Justice *Drummond*, which Letter contained passages commenting on the expressions used by the Judge.

J. C. 1870 *In re* RAMSAY.

Subsequently, and on the 3rd, 4th, 5th, 6th, and 7th of September, 1866, the Petitioner appeared before the Court of Queen's Bench (where Mr. Justice *Drummond* was sitting with his colleagues), and there acted as representative of the Attorney-General for *Lower Canada*, but that learned Judge took no notice of the aforesaid Letters.

On the 23rd of October, 1866, Mr. Justice *Drummond* held a sitting of the Court of Queen's Bench (Crown side), a Court having an original criminal jurisdiction for the trial of offences created and regulated by the Consolidated Statutes for *Lower Canada*, ch. 77, s. 72 (1), and he then, exercising such jurisdiction and sitting by himself, issued of his own accord a rule calling upon the Petitioner to shew cause why he should not be punished for a contempt of Court in writing and publishing the aforesaid Letters.

On the following day the learned Judge caused the rule to be served on the Petitioner, and with it written interrogatories asking him if he was the Author, and had authorized the publication of the Letters in question. The Petitioner applied to Mr. Justice *Drummond* to have the rule declared null and void, taking, amongst other objections, the ground that it was issued without jurisdiction. He also moved that as Mr. Justice *Drummond* was personally interested in the matter he was disqualified from sitting to hear it. Mr. Justice *Drummond* heard and rejected both applications.

The Petitioner declined to answer the interrogatories, but made another application by his Counsel to quash the rule, calling upon him to shew cause why he should not be punished for the alleged contempt; but this motion also was heard and rejected by Mr. Justice *Drummond*.

No further proceedings having been taken in the matter of the

(1) Sect. 72: "Any one of the Judges of the Superior Court may hold any Term or sitting of the Court of Queen's Bench for the exercise of the original criminal jurisdiction of that Court, and shall have all the powers of a Judge thereof, and of the Court, in the exercise of the said jurisdiction; but it shall not be incumbent upon any Judge of the Superior Court to hold any such Term or exercise any such powers at either of the cities of *Quebec* or *Montreal* if there is a Judge of the Court of Queen's Bench present at such city and able to act."

rule, Mr. Justice *Drummond*, towards the end of the term, said in Court (the Petitioner being absent) that he had been misunderstood in so far as he had been supposed to reflect upon the Petitioner in the remarks he had made on the *Lamirande* case. This statement having been communicated to the Petitioner, he, at the suggestion of the Attorney-General for *Lower Canada*, attended in the Court of Queen's Bench (Crown side) the next morning, and told Mr. Justice *Drummond* that he had been informed Mr. Justice *Drummond* had stated that he had been misunderstood in so far as he had been supposed to reflect upon the Petitioner in the remarks he made upon the *Lamirande* case, and the Petitioner asked the Judge if he had been correctly informed, who replied that he had been correctly informed—whereupon the Petitioner expressed his regret that he had so misunderstood the learned Judge, and his desire to withdraw all the reflections which he had made upon him.

Mr. Justice *Drummond* hereupon requested the Petitioner to put his explanation and retractation in writing, to which he consented, and, at his instance, Mr. *Chapleau*, who had been his Counsel, waited on Mr. Justice *Drummond* at his chambers, and submitted to him a draft of the explanation and retractation, which was perused and approved by the learned Judge, and upon Mr. *Chapleau* informing the Petitioner that the terms of the paper were satisfactory to Mr. Justice *Drummond*, the Petitioner signed the same.

On the 2nd of November, 1866, the next day, the Petitioner handed the paper to Mr. Justice *Drummond*, sitting as the Court of Queen's Bench (Crown side), that the same might be filed.

The Judge having, as the Petitioner had been informed, ascertained that the Petitioner was the author of the before-mentioned Letters, adjourned the case till the next day, when he pronounced the following judgment and Order: "*The Queen* v. *Thomas Kennedy Ramsay*. In this case the Court, considering that the Letters mentioned in the said Rule are proved by his own admission to have been written by the said Defendant; considering that the said Letters do contain libellous, insulting, and contemptuous statements and language concerning one of the Justices of the Court whilst acting in his judicial capacity; considering, therefore, that the said

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Defendant has by writing the said letters committed a contempt of this Court, of which contempt the Court doth now declare him guilty; but considering further the explanations contained in the answer filed by the Defendant on the 2nd day of November instant, the Court abstains from ordering an attachment to issue, and limits the sentence now pronounced for such contempt to a fine of forty dollars, which fine the Court doth order, and condemns the said Defendant forthwith to pay to our Sovereign Lady the Queen; and the Court doth further order that the said Defendant do remain committed until the said fine be paid."

Against this judgment the Petitioner brought a writ of Error to the Court of Queen's Bench, but that Court, consisting of the Chief Justice *Duval*, and the Justices *Aylwin*, *Badgley*, and *Mondelet* (Mr. Justice *Drummond* also sitting as a member thereof), decided that no writ of error lay, and quashed the same. Mr. Justice *Mondelet* being of opinion that a writ of Error ought to have been granted.

The Petitioner, with the consent of the Attorney-General, asked leave to appeal to Her Majesty in Council against the above decision of the Court; but the Court refused (Mr. Justice *Mondelet*, *dissentiente*) leave on the ground, that the case was not appealable under the Consolidated Statutes of *Canada*.

The proceedings on appeal in the Courts below having thus been brought to an end, Mr. Justice *Drummond* in the course of a sitting of the Court of Queen's Bench (Crown side), which was being held by Mr. Justice *Mondelet*, entered the Court, and having taken his seat on the Bench of his own accord, ordered a writ of Attachment to issue against the Petitioner to enforce payment of the aforesaid fine.

The Petitioner was thus compelled to pay the fine imposed on him; but feeling greatly aggrieved by the above Orders, and by the refusal of the Court to allow him to appeal, presented a petition to Her Majesty in Council for special leave to appeal against the Order of the 3rd of November, 1866, imposing the fine of forty dollars for an alleged contempt, and also from the judgments of the 6th and 7th of March, 1867, of the Court of Queen's Bench, quashing the writ of Error, and refusing leave to appeal to Her Majesty in Council.

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The Petition now came on for hearing.

Mr. *Wills*, for the Petitioner:—

The Orders in question, especially the one imposing the fine, affecting the professional character and *status* of the Petitioner in the Colony, as well as the independence of the Bar, are proper subjects for appeal, and for the exercise of the power of the Crown, under the 4th section of the 3 & 4 Will. 4, c. 41. In a recent case, *McDermott's* (1), where the publisher of a Newspaper was committed for contempt of Court, leave was given to appeal. So in *Rainy* v. *The Justices of Sierra Leone* (2), where, as in this case, a Barrister was fined for contempt, special leave to appeal was given, though the Judicial Committee, when the appeal came on for hearing, was of opinion that, under the circumstances, they had no jurisdiction. The act of the Petitioner was no contempt of Court, the proceedings commented on by him were proceedings had in Chambers. If there was a contempt, it was a contempt of the Court of Queen's Bench, as a Court of Record, which it could not be when composed but of one Judge, sitting in Chambers. The Letters, said to constitute the contempt, are not set out, and the Order which imposes the fine does not shew upon the face of it, as it ought, the alleged offence. In *Rex* v. *Clement* (3), where the publisher of a Newspaper was fined for contempt of Court, Mr. Justice *Bayley* considered that a writ of Error was the proper remedy. A writ of Error lies in criminal cases: Consolidated Statutes, *Low. Can.*, c. 77, sec. 56.

SIR WILLIAM ERLE:—

We are not disposing of this application finally now, but their Lordships have considered that, by the 3 & 4 Will. 4, c. 41, s. 4, there may be a wide power vested in the Judicial Committee of the Privy Council. That section enacts, that it shall be lawful for the Crown to refer to the Judicial Committee for hearing or

* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT).

(1) Law Rep. 1 P. C. 260. (2) 8 Moore's P. C. Cases, 47.
(3) 4 B. & Ald. 229.

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consideration any matter whatever which Her Majesty shall think fit, and such Committee shall thereupon hear and consider the same, and shall advise Her Majesty thereon. That section has been acted on in several cases, and this Committee have had then to advise Her Majesty as to what is the best course to be pursued. It was the course that was taken in *Rainy* v. *The Justices of Sierra Leone* (1). I am directed by their Lordships to ask you whether, if they prefer that course, you would be content, without pressing for a judgment on the point respecting the writ of Error or the right of appeal from the Order made thereon; and on the understanding that you assent to that course, the judgment of the Court will be, that in the circumstances disclosed by your petition, if, upon your application to the Crown, Her Majesty's Secretary of State thinks fit to refer the matter of the petition to the Judicial Committee we will hear it, and advise Her Majesty thereon, in the same manner as was done in *Rainy's Case*. This course will release us from considering whether special leave to appeal should be granted.

In consequence of this suggestion the petition for special leave to appeal was withdrawn, and a petition substituted which, after stating the circumstances above detailed, prayed Her Majesty to refer the same to Her Judicial Committee for hearing, under the provisions of the 3 & 4 Will. 4, c. 41, s. 4, and by an Order in Council, of the 7th of November, the petition was so referred.

The Petitioner lodged his case, which set forth the above facts. Mr. Justice *Drummond*, having had due notice of the proceedings, and, after great delay, declining to put in any case or appear, the petition now came on for hearing.

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Sir *R. Palmer* (Mr. *Wills*, and Mr. *Sturge* with him), for the Petitioner:—

In the form the case now comes before this Tribunal the course pursued is similar to that in the case of *Rainy* v. *The Justices of Sierra Leone* (2), there a fine had been imposed for an alleged contempt, and, without deciding any legal point, the Judicial Committee recommended that such fine should be remitted. The Petitioner, of course, attaches no importance to the fine itself.

(1) 8 Moore's P. C. Cases, 47. (2) Ibid. 47.

He impugns the propriety as well as the validity of Mr. Justice *Drummond's* proceedings. The Letters complained of were not a contempt of Court, and even if a contempt, were amply apologised for, and condoned by the learned Judge. The proceedings taken by him were, however, wholly irregular; he had no jurisdiction, while sitting alone, to call on the Petitioner to answer a contempt, which, if committed, ought to have been noticed in the previous sittings of the whole Court, according to the provisions of chapter 95 of the Consolidated Statutes of *Lower Canada*. The jurisdiction conferred upon the Judges by the 72nd section of the 77th chapter of the Consolidated Statutes of *Canada* gives no authority to issue such a rule as that of the 23rd of October, 1866, which, besides being bad as *ultrà vires* the judicial authority of the Judge, was, being at the mere motion of the Judge himself, palpably irregular and absolutely void. The proceedings thereon ought never to have been taken, and the imposition of a fine was as illegal as it was oppressive.

No judgment was given, but their Lordships reported to Her Majesty in Council that they had, in obedience to Her Majesty's Order in Council, taken the petition referred to them into consideration, and having heard Counsel on behalf of the Petitioner (the Hon. Mr. Justice *Drummond* not having appeared or lodged a case), their Lordships agreed to report to Her Majesty that, in their judgment, the Hon. Mr. Justice *Drummond*, whilst sitting alone in the exercise of the criminal jurisdiction conferred upon the Judges of the Court of Queen's Bench by the 77th of the Consolidated Statutes of *Lower Canada*, had no authority to issue the Rule of the 23rd of October, 1866, or to adjudge that the Petitioner had been guilty of a contempt of Court in publishing the two Letters of the 27th of August and the 30th of August, 1866, or to impose a fine of forty dollars upon the Petitioner; and that all proceedings against the Petitioner for the said alleged contempt in publishing Letters reflecting on the conduct of the Hon. Mr. Justice *Drummond*, whilst acting as a Judge of the Court of Queen's Bench, under chapter 95 of the Consolidated Statutes of *Lower Canada*, could only legally and properly be taken before the full Court of Queen's Bench. Their Lordships

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were also of opinion, that the proceedings against the Petitioner were in other respects most irregularly conducted; the Rule of the 25th of September, 1866, was issued without any evidence that the Petitioner was the person who had written and published the Letters, and the only evidence which was ever obtained of the Petitioner having written the Letters consisted of an admission in writing made by the Petitioner, at the instance of the Hon. Mr. Justice *Drummond*, for the purpose of settling the dispute between them, and which, if not accepted as a sufficient apology, ought to have been treated as written without prejudice. On the whole, their Lordships reported to Her Majesty that, although there were expressions in the Letters of the Petitioner of which their Lordships could not approve, and of which the Hon. Mr. Justice *Drummond* had a right to complain, yet, for the reasons above stated, in the opinion of their Lordships, the fine of forty dollars imposed on the Petitioner ought to be remitted.

Solicitors for the Petitioner: *Ashurst, Morris & Co.*

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THE OWNERS OF THE STEAMSHIP "ESK" . . . . . } . APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "NIORD" . . . . . } . RESPONDENTS

THE "ESK" AND THE "NIORD."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Steering and Sailing Regulations, Art. 14, *when applicable—Practice on appeals involving facts alone.*

2 P.D. 104

Collision between two Steamships, the *Niord* and the *Esk*, whilst rounding a point on the Kentish side of the River *Thames* which divides the reach called the *Half-way Reach* from the *Barking Reach*. The *Niord* coming up, and seeing the *Esk* rounding the point, having put her helm hard-a-port, in order to cross the river, the *Esk* stopped, and reversed her engines, and put

* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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her helm a-starboard, the result causing a collision; the *Esk* running almost at right angles into the *Niord*, nearly at her midships, cutting clean into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore:—*Held*, that, without determining whether these Vessels were crossing Vessels within the meaning of the 14th Article of the Steering and Sailing Rules, that the *Esk* was solely to blame, and the decree of the Admiralty Court, in that respect, affirmed.

The construction put on the 14th Article in the case of *The Velocity* (1) explained and limited.

The principles laid down in *The Julia* (2), which uniformly guide the appellate Court upon questions of fact, adopted.

A CAUSE of damage and cross cause, the former promoted by the Owners of the Steamship *Niord*, the Respondents, against the Steamship *Esk*, belonging to the Appellants, for the recovery of damages in respect of a collision which occurred between them. The cross cause was brought by the Appellants, the owners of the *Esk*, against the Respondents, on account of the same collision, which happened on the 12th of November, 1869.

On that day, about 9·30 A.M., the *Niord*, an iron Screw-steamship of 247 tons register, worked by engines of seventy horse-power, and manned by a crew of sixteen hands, was coming up *Half-way Reach*, in the River *Thames*. The weather at the time was fine, and moderately clear, the wind light from about E.N.E., and the tide first quarter ebb. The *Niord* was in charge of a duly licensed Pilot, and was going about eight knots an hour, under steam alone. As the *Niord* was approaching the *Half-way House Point*, on the south shore, at the top of *Half-way Reach*, the *Esk*, a Screw-steamer of 446 tons register and ninety horse-power, was observed coming down *Barking Reach*, which is the reach above *Half-way Reach*. At this time there were several Vessels bound downwards, and occupying the northern half of the River, and the *Niord* was, therefore, necessarily kept somewhat to the southward of mid-channel. As the *Esk* drew nearer, the helm of the *Niord* was put to port, in order to allow more room for the *Esk* to port also, and pass port side to port side in rounding the point. The *Esk*, however, instead of so doing, was seen to be keeping off from the Point, standing over, angling to the north shore, crossing the bows of the *Niord*. Thereupon, the helm of

(1) Law Rep 3 P. C. 44. (2) 14 Moore's P. C Cases, 210.

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the *Niord* was at once put hard-aport, notwithstanding which, the *Esk* almost immediately ran stem-on into her port side, rather abaft midships, cutting several feet into her, and going clean into her boiler, and causing her to begin at once to fill with water, so that, in order to prevent her sinking in deep water, it was necessary to run the *Niord* immediately ashore on the north bank of the River, which was done accordingly.

Both causes were heard together, upon the same pleadings and evidence, by the Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*), assisted by two of the Trinity Masters, when the learned Judge, with the advice and concurrence of the Trinity Masters, pronounced, in the cause of the *Niord*, the *Esk* solely to blame for the collision; and in the cause of the *Esk* he made a decree in favour of the Respondents, and dismissed them from all further observance in the suit. In the course of his judgment, the learned Judge was reported to have made the following observations, with respect to the effect of the case of *The Velocity* (1). After stating the facts of the case, he observed: "It appears that both these Vessels (the *Niord* and the *Esk*) were in the same Reach. steering nearly opposite courses; the River seems not to have been in any material degree crowded with shipping, or to have presented any circumstances of difficulty to a navigation conducted with ordinary skill and care. After the recent decision of the Privy Council in the case of *The Velocity*, I think I am bound to hold, that it was competent to either Vessel to pass on either shore. The *Niord*, availing herself of this right, ported her helm, and attempted to pass on the north shore; and I am informed by the Trinity Masters that this was her proper course, according to the custom of the River. While the *Niord* was taking this course the two Vessels came into collision."

The present appeal was from the decree in these causes.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Owners of the *Esk*:—

Contended, that the main question at issue between the parties, whether there would have been danger of collision if neither vessel had altered her course, was not decided by the learned Judge of the Court below. They insisted, that the evidence

(1) Law Rep. 3 P. C. 44.

proved, that there would not have been any danger of collision if the *Niord* had not ported her helm, and that such porting brought about the collision, and that no blame attached to the *Esk*, either for starboarding her helm, or on any other grounds. They referred to *The Velocity* (1), and relied on Articles 14, 18, and 19 of the Steering and Sailing Rules, especially the 14th, which, they urged, ought to have been observed by the *Niord*, and the collision prevented.

Mr. *Butt*, Q.C., and Mr. *Walter Phillimore*, for the Owners of the *Niord*:—

Maintained, that by the evidence it was satisfactorily proved that the collision in question was occasioned solely by the fault of the Master and Crew of the *Esk*; and that the judgment of the Court below was strictly right, and ought to be affirmed. They denied the application of the 14th Article of the Steering and Sailing Rules to the circumstances of the case, and referred to the 18th, and subsequent Articles, as qualifying the 14th, even if that Article had been applicable, and the rule there given capable of being acted on.

SIR JAMES W. COLVILE:—

The collision which has given rise to the cause and cross-cause which are now brought on appeal before their Lordships took place in that portion of the River *Thames* which is known as the *Half-way Reach*, on the 12th of November, 1869, about half-past nine on that morning. The Screw-steamer *Esk*, a Collier in ballast, was proceeding down the River, and the *Niord*, a Swedish Screw-steamer laden with oats, was coming up the River. Near the place of collision is a not very well defined point on the southern or *Kentish* side of the River, which divides the *Half-way Reach* from the *Barking Reach*. The Vessels appear to have first sighted each other across this point, whilst the *Esk* was coming down the *Barking Reach*; and as they approached each other, the *Niord*, which was in charge of a licensed Pilot, first ported her helm and then put in hard a-port until she had paid off about five points. The *Esk*, on the other hand, upon seeing this manœuvre of the *Niord*, stopped and reversed her engines, and put her helm

(1) Law Rep. 3 P. C. 44.

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hard a-starboard. The result was a collision, the *Esk* running almost at a right angle into the *Niord*, nearly amidships, cutting clean into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore on the northern side of the River.

These facts seem to be undisputed. The evidence as to the precise time at which the manœuvres were executed, the circumstances which preceded them, and the relative positions of the Vessels when the *Esk* first rounded the point, is conflicting, and in many respects even more loose and unsatisfactory than nautical evidence in cases of collision almost proverbially is. Upon that evidence, however, the learned Judge of the Admiralty Court, assisted by two Elder Brethren of the Trinity House, came to the conclusion that the *Esk* was solely in fault; and upon the principles which uniformly guide this Board, and which are more particularly laid down and enforced in the case of *The Julia* (1), it will be their Lordships' duty to affirm that decision upon questions of fact, unless they are clearly satisfied that it is erroneous.

Before, however, they proceed to consider the effect of the evidence, and of the arguments which have been founded upon it, their Lordships deem it right to make a few observations upon the case of *The Velocity*, which was cited by the learned Judge of the Admiralty Court in his judgment, and has also been cited at the Bar, in order to remove any possible misapprehension which may exist concerning its effect.

In that case the Admiralty Court had held that the case was one which fell within the 14th of the Steering and Sailing Rules; that the two Steamers in question were crossing each other; that it was the duty of the *Velocity* to keep her course, and the duty of the other vessel (the *Carbon*) to get out of the way; that the *Carbon* by porting her helm, which brought her across the River, had executed the manœuvre which the performance of her duty required; and that the *Velocity* had failed to keep her course, and was, therefore, solely in fault. The appellate Court, on the other hand, held that the case was not one of two Vessels crossing within the meaning of the 18th of the same Rules, by which the 14th is to be construed; that the course of the *Velocity* was, after rounding the *Millwall Pier*, to run down the River on the north

(1) 14 Moore's P. C. Cases, 210.

shore; that the *Carbon* was not justified in assuming that the *Velocity* was crossing the River, but should have pursued her own course on the south of the mid-channel, in which case the two Vessels would have passed free starboard to starboard. It held further, that if the case was one within the 18th Rule, the *Carbon* was still to blame, inasmuch as she had not got out of the way of the *Velocity*, which had "kept her course;" their Lordships holding that according to the true interpretation of the term in that Rule "keeping her course," she was at liberty to hold on upon the course which she would have pursued had no Vessel been in sight, and was not bound to follow the direction in which her head, as she rounded the point, happened to be at the moment when she was first sighted. In the course of the argument, however, it had been brought to their Lordships' notice that whilst the *Merchant Shipping Act* of 1854 was in force, the *Velocity* (1) would, under its provisions, have been bound to keep on the south side of the mid-channel. But their Lordships, adverting to the repeal of the 297th Section of that Act, observed that "Vessels navigating the River were now at liberty to go on whichever side of it they pleased, taking care, of course, to observe the regulations for preventing collisions."

This ruling seems to their Lordships to be by no means so broad as the summary of it which appears in the shorthand writer's note of the judgment in the Admiralty Court. If, for instance, it were clear upon the evidence that the two Vessels would have gone clear of each other if each had held on upon her own course, then the ruling would not have justified the *Niord* in crossing the course of the *Esk*, and so by her own act bringing the two Vessels into the category of crossing Vessels, since by such an act she would have violated the Regulations for preventing collisions, and would have done that which, it was held in the case of *The Velocity*, she ought not to have done.

It is probable, however, that the learned Judge of the Admiralty Court only meant to say that in shaping her course up the River, the *Niord*, under the decision in the case of the *Velocity*, was generally free to pass from the one side of the mid-channel to the other.

(1) Law Rep. 3 P. C. 44.

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Again, something has been said in argument of the negligence of the Master of the *Esk*, in leaving his Vessel in charge of the licensed Waterman, Mr. *Braine*, and of the insufficiency of the look-out, in consequence of the mate quitting the forecastle. As to the first point, it is sufficient to observe that whatever blame may attach to the Master for leaving the steerage and manœuvres of the Vessel in charge of the Waterman, that circumstance cannot affect the decision of this appeal, since the Owners of the *Esk* are clearly responsible for the acts and omissions of the Waterman as one of the crew. The insufficiency of the outlook, which their Lordships think is established by the evidence, is a very material consideration, if the evidence really affords ground for believing that had there been a proper outlook on board the *Esk* the accident would have been avoided.

The real question, as it seems to their Lordships, is this—was the *Niord* justified in coming across the River under a port helm? If she was, then if the effect of that manœuvre was to make the Vessels crossing Vessels within the 14th of the Steering and Sailing Rules, it seems to have been the duty of the *Esk* to get out of the way; and she failed to do so. On the other hand, if whilst executing that manœuvre the *Niord* was still in such a position that the two Vessels, keeping each its proper course, might have passed each other free port-side to port-side, it was the duty of the *Esk*, by porting her helm, to ensure that safe passage, whereas by starboarding she brought about the collision.

Their Lordships do not think it necessary to affirm that these Vessels were, at the moment at which they first sighted each other, crossing Vessels within the meaning of the Rule; they will assume that the case does not strictly fall within the Rule, and will then consider which Vessel was in fault, dealing with that question as one of general navigation.

They have had the benefit of consulting their Nautical Assessors, and those gentlemen entirely concur with the Trinity Masters, and with the learned Judge of the Admiralty Court, in the conclusion to which they came—that the *Esk* was solely in fault. The *Esk* unquestionably, in rounding the point, must have been under the port helm for a time. The other Vessel had been hugging the south shore, and would, in the ordinary

course of navigation, have gone under a port helm to the other side of the River about the point at which she did go. On the other hand, there seems to be no reason why the *Esk* coming round the point under a port helm, should not have followed the southward shore, continuing to port her helm.

At all events, whatever may have been her rights, or whatever course she might have taken had no other Vessel been in the way, it was clearly her duty to observe the *Niord*, to see whether she was taking that course which persons acquainted with the navigation of the River must have known to be the ordinary course, viz., that of crossing the River, and to conduct her own manœuvres accordingly. She seems to their Lordships not to have done this. Whether in consequence of the insufficiency of the outlook she did not discover early enough what the *Niord* was doing, or whether from any other cause she failed to take the course which their Lordships, as advised by their Nautical Assessors, conceive was the right course, namely, that of porting her helm—she must be held responsible for the collision.

Their Lordships do not consider it necessary to go further into the discrepancies in the evidence upon various points which have been commented upon at the Bar. They will, however, mention that, in their opinion, the place of the collision cannot have been below the lower creek marked in the chart, and therefore must have taken place shortly after the rounding of the point by the *Esk*. On the whole case, looking at the question as one of navigation on which four professional persons concur in supporting the judgment of the Court below, their Lordships feel it to be their duty to advise Her Majesty to dismiss this appeal with costs.

Proctors for the Appellants: *Clarkson, Son, & Greenwall.*
Proctor for the Repondents: *H. G. Stokes.*

J. C.* 1870 Dec. 1.

JAMES SMALLBONES . . . . . Appellant;

AND

GEORGE EDNEY AND WILLIAM LUNN . . Respondents.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Church-rate—5 Geo. 4, c. 36—Church repairs, including Chancel—Liability of the tithe Impropriator.

3 A. & E. 364. & 9 Q.B. 322.

According to the true construction of the Act, 5 Geo. 4, c. 36, the Owner of a tithe rent-charge in a Parish (though not liable to be rated to an ordinary Church-rate) is liable to be assessed to a rate made for the repayment of money borrowed by the Churchwardens and Overseers from the Public Works Loan Commissioners, under the provisions of that Act, for the purpose of repairing and enlarging the Parish Church, including the Chancel.

THE appeal in this case was from a judgment of the Arches Court of *Canterbury* pronounced in a suit for subtraction of Church-rate, in which suit the Respondents, the Churchwardens of the Parish of *Whitchurch*, in the County of *Southampton*, were the Promoters, against the Appellant, a Parishioner, and by which judgment the Appellant was ordered to pay his assessment to the Church-rate.

The circumstances of the case were as follows:—

On the 14th of February, 1867, at a Vestry meeting of the inhabitants and occupiers of the Parish of *Whitchurch*, it was resolved, "First, that this meeting determines that the sum of money requisite for the purpose of repairing and enlarging the Parish Church of *Whitchurch* amounts to £4,000, including all contingent expenses. Second, that this meeting resolve, direct, and consent that the Churchwardens and Overseers of the poor of the Parish of *Whitchurch* do, with the consent of the Bishop of the Diocese and the Incumbent of the Parish, make application to the Commissioners authorized and empowered under the provisions of the Act, 5 Geo. 4, c. 36, and of the Acts therein recited or referred to, or subsequently passed for amending, continuing, or extending the same, to make advances for public works, for a loan of £2,000."

* *Present*:—Sir James William Colvile, The Lord Justice James, and The Lord Justice Mellish.

An application to the Public Works Loan Commissioners was, in pursuance of this resolution, made, and on the 18th of March, 1867, the Commissioners advanced to the Churchwardens and Overseers of the poor of the Parish that sum for the purposes aforesaid, upon the security of the rates of the Parish, to be repaid in annual instalments of £100, with interest at the rate of 4 per cent.

On the 18th of June, 1867, a Faculty was obtained from the Consistorial Court of *Winchester* authorizing the enlarging, restoring, and renewing the Parish Church of *Whitchurch*.

The £2,000 so borrowed from the Commissioners formed, with other moneys raised by voluntary subscriptions, a general fund, out of which the cost of the repairs of the body and of the Chancel of the Parish Church was defrayed without distinction.

On the 7th of February, 1868, the Churchwardens and Overseers made the rate in question at the rate of sixpence in the pound upon the Inhabitants and Parishioners of the Parish, such rate being assessed on the property of those Parishioners only who, according to the Common Law, were liable to keep in good and sufficient repair the body of the Church, but was not assessed on the tithe rent-charge of the Impropriator, amounting to the rateable value of £1,189.

The Appellant having refused to pay the amount at which he was assessed to the rate, the usual proceedings were taken before the Petty Sessions, and the case was afterwards brought by Letters of Request from the Chancellor of the Diocese of *Winchester* to the Arches Court of *Canterbury*. The cause was heard on the 28th of July, 1869, before the Dean of the Arches (The Right Hon. Sir *Robert Phillimore*), and judgment pronounced on that day decreeing the Appellant to pay the amount of his assessment.

The appeal was from this sentence.

The *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Dr. *Swabey*, for the Appellant:—

The rate in question was an invalid rate. It excluded the tithe rent-charge of the Impropriator, amounting at the time the rate was made to a rateable value of £1,189, which was neither rated nor assessed. The rate, which was for the general repairs of the

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Church including the Chancel, was made in pursuance and under the provisions of the Act, 5 Geo. 4, c. 36, sect. 1. Now, the rates mentioned and provided for in that Act are entirely distinct and different in kind from Church-rates under the Common Law, though, by the 2nd section of the Act, they are made recoverable in the same manner as Church-rates were. They are limited to the repayment of loans obtained from the Commissioners of Public Loan Works for the sole purpose of defraying "the expense or any part of the expense of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any Church or Chapel of any Parish." The Act requires "the consent of the major part of the Inhabitants and occupiers assessed to the relief of the poor," to the application to the Commissioners for Public Works for such a loan as the one in question, and then gives authority to the Churchwardens to make and levy half-yearly rates for the repayment thereof. Impropriate tithes are liable to the poor-rate; such liability is, by the enactments of the Act, the test of the rateability of the property to be assessed for the Church-rates there provided for. There is no limit of the property to be assessed, or exemption to which the money raised is to be applied. In fact, the money to be raised by the rate is to pay off a debt contracted indiscriminately for the benefit of the Chancel as well as the body of the Church; the reason, therefore, of the exemption of the tithe rent-charge from the Church-rate, as under the Common Law, does not apply. But the tithe rent-charge being by Common Law subject to the burden of the repairs of the Chancel, it ought to have been assessed *pro ratâ* to the rate in question. It has been held in *Rippin* v. *Bastin* (1) that the expenditure of moneys raised by loan under the Church Building Acts, 58 Geo. 3, c. 45, s. 56, and 3 Geo. 4, c. 72, s. 5, upon the repair of the Chancel, is lawful; and in *Rex* v. *Barker* (2) a Lessee and occupier of Tithes was, under the Act, 1 Will. 4, c. 57, held to be rateable for expenses in rebuilding the Parish Church. So stock in trade is rateable: *Miller* v. *Bloomfield* (3). It would, therefore, be most unjust to hold that the Tithe Impropriator, who may be, and in this case is, relieved from the burden of repairing the Chancel,

(1) Law Rep. 2 A. & E. 386. (2) 6 Ad. & El. 388.
(3) 1 Addams, 499.

should not be assessable like any other Parishioner to the burden of repairing the Church. The rate is bad, and must be quashed.

Dr. *Tristram*, for the Respondents:—

The rate in question is a valid rate, and the tithe rent-charge was properly exempted. Being exempt by Common Law from rates for the repairs of any other part of the Church, except the Chancel: *Burn's* Ecc. Law, Vol. I., p. 342 [9th Ed.]; it cannot be included by mere implication from the general powers and authority of the Act, 5 Geo. 4, c. 36. The only ground for inferring such intention of the Act is the manner of collecting and enforcing the rates made by virtue of it. If a new construction is to be put upon the Act, the law exempting rectorial Tithes from the general obligation of rates for the repairs of the Church would be repealed without any equivalent to the lay Impropriator, who is still liable to repair the Chancel when called upon to do so. The right of the Impropriator to exemption can only be taken away by the express words of the Act, 5 Geo. 4, c. 36, not by implication, as contended by the Appellant. He also referred to *Ranson* v. *Campkin* (1).

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Judgment was reserved, and now delivered by

LORD JUSTICE MELLISH:—

This is an appeal from the judgment of the Court of Arches in a suit brought by the Churchwardens of the Parish Church of *Whitchurch*, for subtraction of an alleged rate made under the 5 Geo. 4, c. 36, s. 1, against *James Smallbones*, the Appellant, by which the Appellant was ordered to pay his assessment to the rate and the costs of suit. It appeared that, in 1867, the sum of £2,000 was borrowed from the Commissioners authorized to make advances for Public Works, under the provisions of the Act, for the purpose of repairing and enlarging the Parish Church of *Whitchurch*, and that on the 7th of February, 1868, the Churchwardens and Overseers of the Parish of *Whitchurch* made a rate of sixpence in the pound upon the Inhabitants and Parishioners of the Parish of *Whitchurch* for the purpose of paying the annual instalment, and the interest of the said sum of £2,000, which became due to

(1) 2 Rob. Ecc. Cases, 370.

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the Commissioners on the 18th of March. The Appellant occupied a house in the Parish, and was rated at the sum of 5*s.* 6*d.* The defence to the suit was, that *Melville Portal*, Esq., the Owner of a tithe rent-charge of the rateable value of £1,189, arising out of lands in the Parish, was not assessed to the rate in respect of such tithe rent-charge, and it was admitted that if he ought to have been so assessed the rate was bad, and that the Appellant would be entitled to succeed. The question, therefore, is, whether, according to the true construction of the 5 Geo. 4, c. 36, the owner of a tithe rent-charge in a Parish is liable to be assessed to the rates made for the repayment of money borrowed under the provisions of the Act? The 1st and 2nd sections of the Act are as follows:—

By section 1 it is enacted, that "from and after the passing of this Act it shall be lawful for the Churchwardens or Chapelwardens and Overseers of the Poor of any Parish in *England* or *Wales*, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, and with the consent of the Bishop of the Diocese, and the Incumbent of such Parish, to make application to the Commissioners authorized and empowered to make advances for public works under the provisions of the said recited Acts, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, for such sum or sums in Exchequer bills or money, as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any Church or Chapel of any such Parish. And if such Commissioners shall think fit to entertain such application, and shall be satisfied that such consent as required by this Act has been given and obtained, it shall and may be lawful for such Commissioners, and they are hereby authorized and empowered, to make and grant any such loan or advance for the purposes aforesaid, in such manner as such Commissioners are empowered to make any loan or advance under the authority of the said recited Acts or any of them; and it shall be lawful for such Churchwardens or Chapelwardens, together with the Overseers of the Poor of or for any such Parish with respect to which such application shall be made and granted, to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application;

and from and after the grant of any such loan or advance it shall be lawful for the Churchwardens or Chapelwardens, and Overseers of the Poor of the Parish in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time for the time being, and they are hereby authorized and required, to make such annual or half-yearly rates for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said Commissioners on that behalf, and to assign the rates so to be made as aforesaid as a security for repayment of the sums so advanced, in such manner and form as the said Commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest thereon, at and after the rate of £4 per centum per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within the period of twenty years at the farthest from the advancing of any such sums respectively."

And by section 2 it is enacted, "That it shall be lawful for any Churchwarden or Chapelwarden, or Overseer, in any Parish in which any rates shall be made under the provisions of this Act, to collect, demand, and receive, sue for, levy, and recover all such rates, by all such ways and means as any Church-rates may by law be collected, demanded, received, sued for, levied, and recovered, as fully and effectually as if all power, authorities, provisions, penalties, and forfeitures relating to the collecting, demanding, suing for, levying, receiving, and recovering of any Church-rates, or relating to any refusal to pay any like rates, were specially repeated and enacted in this Act, any law, Statute, usage, or custom to the contrary notwithstanding."

The learned Judge in the Court below has held, that though the Act does not specify the property on which the rate is to be levied, yet it is to be implied, that it is only to be levied on those on whom a Church-rate is to be levied, and that as the owner of a tithe rent-charge was not liable to be rated to an ordinary Church-rate, he was not liable to be rated to a rate made under the Act. The Act, however, nowhere describes the rates as Church-rates. On the contrary, it expressly distinguishes between the rates made under the provisions of the Act and Church-rates, and, although their Lordships agree, there are strong reasons for holding that

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every person liable to be assessed to a Church-rate is also liable to be assessed to a rate under the Act, because every such person is benefited by money being borrowed for the repair or building of the Church, yet it does not follow that every person who is exempted from liability to a Church-rate is also to be exempted from a liability to pay a rate under the Act, unless the reason for his exemption is equally applicable. Now a tithe Owner is exempted from an ordinary Church-rate for the repair of the body of a Church because he is under a particular liability to repair the Chancel. He is not less liable, but more liable, than the Owners of other property in the parish to repair the Church, being under a personal liability to repair a particular part of it. He is, therefore, not less benefited, but more benefited than the Owners of other property in the parish by money being borrowed under the Act for the repairing, rebuilding, or enlarging the whole Church, including the Chancel, and in this very case it is admitted that the money borrowed was expended in rebuilding the Chancel as well as the rest of the Church. Moreover, the Owner of a tithe rent-charge, being an occupier of property assessed to the relief of the poor, is by the express words of the statute entitled to be present and to vote in the Vestry on the question whether the money should be borrowed: and it would be strange if a person who, in respect of particular property, is entitled to vote on the question whether the money should be borrowed, and being in fact one of the borrowers, should not also be liable to be rated in respect of the same property to the rates made for the repayment of the money. It is indeed true that, in the case of an ordinary Church-rate also, a tithe Owner is entitled to be present and to vote in the Vestry which imposes the rate, and, nevertheless, is not assessed to it; but, then, the money raised by an ordinary Church-rate cannot be expended in the repair of the Chancel, and the tithe Owner, by the ancient custom of the realm, is to be considered as having compounded for his liability to contribute to the Church-rate by having taken upon himself the exclusive liability to repair the Chancel.

On the whole, their Lordships are of opinion, that the Owner of a tithe rent-charge being the occupier of property in the Parish in respect of which he is entitled to vote upon the question whether money should be borrowed under the Act, and receiving as much

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or more benefit from the money being borrowed as the Owners of other property in the Parish, ought to be held liable to be rated to the rates made under the Act; and they will accordingly advise Her Majesty, that the judgment of the Court of Arches ought to be reversed, and that judgment should be entered for the present Appellant, with costs in the Court below, and the costs of this appeal.

Proctors for the Appellant: *Fielder & Sumner.*
Proctor for the Respondents: *Ring.*

IN THE MATTER OF VICTORIA SKINNER, *alias* NAWSHABA BEGUM.

J. C.*
1870
Dec. 5.

ON PETITION FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES OF INDIA.

Practice—Leave to appeal—Custody of infant—Access to infant by Mother pending appeal.

4 P C 67

Special leave to appeal allowed from an Order of the High Court of Judicature for the *North-Western Provinces of India*, by which Order an infant Daughter was taken from the custody of her Mother, a Mahomedan, on the ground, that the Minor's deceased Father had been a professed Christian, and her Mother, who was, as the Court held, living in adultery, was inducing her Daughter to adopt the faith and habits of a Mahomedan.

Liberty given, pending the hearing of the appeal, to the Petitioner to apply to the High Court to have access at suitable times to her Daughter.

S C at hearing of appeal 4 P C 60

THIS was a petition by *Helen Skinner*, otherwise known as *Badshaw Begum*, an inhabitant of *Meerut*, in the *North-Western Provinces of India*, the Widow of *George Skinner*, who was a professed Christian, and Mother of *Victoria Skinner*, his Daughter, a Minor, for special leave to appeal from Orders of the High Court of Judicature in that Province, affirming a previous Order of the Judge of the District Court at *Meerut*, whereby the Minor, *Victoria Skinner*, was removed from the custody of her Mother by

* *Present*:—SIR ROBERT PHILLIMORE (THE JUDGE OF THE ADMIRALTY COURT), THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

J. C. 1870 *In re* SKINNER.

reason, as alleged, that the Petitioner was a professed Mahomedan, living, as the Court held, in adultery with a Mr. *John* (calling himself *Mahomed Jan Allam*), professing the Mahomedan religion, and alleging himself to have contracted a Mahomedan marriage with the Petitioner, notwithstanding that he had a Christian Wife living at the time. The Petitioner sought restoration of her Daughter to her custody.

The application was *ex parte*.

The petition stated that the Petitioner's Husband, *George Skinner*, was murdered at *Delhi* in the early part of 1857, during the Mutiny, and left the Petitioner and a Daughter, *Victoria*, then of the age of between one and two years, surviving: that the Petitioner, who was the illegitimate Daughter of a Collector in the Civil Service, from the age of four months, when her Father died, was brought up in the *Zenana*, and observed all the ceremonies of the Mahomedan religion, such as fasts, prayers, &c., and was instructed in the *Koran*, up to the time of her marriage with *George Skinner*, and that she lived behind the *purdah:* that the Petitioner had not, nor had any of her relatives, ever been to an European entertainment, and that they always took their meals at the *duster-khan* (cloth spread on the ground), and ate in the native manner: the Petitioner had never been in a Church, except on the occasion of her marriage with *George Skinner*, and had since that marriage continued to live as a Mahomedan, and behind the *purdah*, as she did before: that *George Skinner's* Mother was a native woman of *Rajpootana*, and had been a Hindoo, but was converted to Mahomedanism, and that *George Skinner's* family lived in the Mahomedan fashion: that *George Skinner* lived in his own house like a Mahomedan, and never went to Church, except, as before-mentioned, on his marriage with the Petitioner: that, although nominally a Christian, *George Skinner* never associated with Christians, but only with the native gentry of the Town of *Delhi*, and that she, the Petitioner could only read and write English very imperfectly: that after the death of *George Skinner* the Petitioner lived for about ten years with different members of his family, and during all that time both the Petitioner and her Daughter lived in the Mahomedan fashion: that after leaving the *Skinner* family the Petitioner and her Daughter lived with the Petitioner's Brother, *Nawab Mirza*, in

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the Mahomedan style: that about four years ago Mr. *James Skinner*, the Brother of *George Skinner*, deceased, introduced *John Thomas John* to the Petitioner's Brother, with whom Mr. *John Thomas John* became very intimate: that *John Thomas John* was formerly a Christian, but became a convert to Mahomedanism, and shortly afterwards, namely, on the 24th of October, 1867, the Petitioner was married to Mr. *John* according to the rites of the Mahomedan religion: that at that time Mr. *John* had another Wife living, whom he had married some years before according to the rites of the Christian religion, which he professed at the time of such first marriage: after the Petitioner's marriage with Mr. *John*, the Petitioner resided next door to Mrs. *James Skinner* and her Daughter and Son-in-law, Mr. and Mrs. *James Orde:* Mrs. *James Skinner* was the Widow of the Uncle of *George Skinner*, the Petitioner's former Husband, and was the Sister of the Colonel *Barlow* hereinafter mentioned: and that for some years Mrs. *James Skinner* has professed, and still continues to profess, the Mahomedan religion, and live entirely in the Mahomedan fashion: that Mrs. *Orde* professed Christianity, but never attended Church, wore the native costume, and, to a considerable extent, observed the Mahomedan custom of the *purdah* (rules of seclusion): after the marriage between the Petitioner and Mr. *John*, the Petitioner's Daughter, *Victoria*, continued, as she had always done, to reside with the Petitioner, and both the Petitioner and her Daughter, *Victoria*, were in the habit of visiting Mrs. *James Skinner* and Mrs. *Orde*, and were on terms of intimacy with them down to the commencement of the institution of the suit: that Mrs. *James Skinner* and Mrs. *Orde* were both aware that the Petitioner had embraced the Mahomedan religion, and was married to Mr. *John*, and never raised any question as to the validity of the marriage up to the date of the correspondence thereinafter mentioned: that the Petitioner's Daughter had never been brought up in any other manner or style than according to the habits and manner of the natives of *India:* that in the early part of this year Mr. *John* became aware that Mrs. *James Skinner* had spread some reports reflecting upon his character, and had also spoken ill of him in the presence of the Petitioner's Daughter, and in consequence of this a correspondence ensued between Mrs. *James Skinner* and Mr.

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John, and ultimately, on the 14th of March, 1870, Mr. *John* wrote a Letter to Mrs. *James Skinner* in which he threatened to take criminal proceedings against her: that on the 21st of March, 1870, Colonel *Barlow*, Mr. and Mrs. *Orde*, and Mrs. *James Skinner*, presented a joint petition to the Judge at *Meerut*, alleging, in effect, that the Petitioner was living in adultery with Mr. *John*, and that the Petitioner's Daughter had been withdrawn from school and all Christian association, and was receiving no education, but that, on the contrary, her religious and moral principles were being systematically corrupted, and she was being seduced into the faith and habits of Mahomedans: that the above petition also alleged that large sums of money had been received on account of her Daughter by the Petitioner, and had been misappropriated, and prayed that Guardians might be appointed to the person and property of the Petitioner's Daughter, and that an account might be taken of the moneys received and expended on her behalf: that this petition was supported by the depositions of Mr. *Orde* and Colonel *Barlow* made on the 22nd of March, 1870, and on the same day, by the Order of the Court, the Petitioner's Daughter was placed in the charge of Mrs. *James Skinner:* on the 31st of March, the Petitioner and Mr. *John* filed a written statement in answer to the petition, and therein set forth the facts above stated, and prayed that the Court would consult the Minor's wishes both as to her guardianship and as to the religion she wished to embrace: that evidence was adduced before the Judge, and in particular the Petitioner's Daughter, who was then of the age of fourteen years, but who appeared to be much older, was examined, and deposed that no one had ever persuaded her to be a Mahomedan, but that her own feelings alone prompted her to become, and that she wished to be, a Mahomedan; she also stated, that she wished to return to the Petitioner (she being at that time in the custody of Mrs. *James Skinner*, by the Order of the Court): that the charge of misappropriating the Minor's money was withdrawn, and it was stated that no proof whatever was given that the Petitioner's Daughter had been withdrawn from Christian association, or that her moral principles were being corrupted or attacked in any way, or that any attempt had been made to convert her to Mahomedanism, it being simply proved, and, indeed, admitted by the Peti-

tioner, that her Daughter had left school about a year before, and since that time had professed Mahomedanism, and lived as a *purdahnasheen:* that on the 19th of May, 1870, the Judge of the District Court at *Meerut* ordered that the Minor should be for the present removed from the Mother's care, that the charge of her property be placed under the Collector of the District, and that another Guardian be appointed for her person, the selection of such Guardian to be left for further consideration, and made either by the Court, when, on the suggestion of either party, or otherwise, it can find a person fitted for the charge (probably a respectable Lady mistress of some School on the Hills might be found willing and capable of undertaking it), or by consent of the parties themselves: that meanwhile the Minor should remain as at present, and till such Guardian be appointed, or till further orders, with and under the care of Mrs. *James Skinner,* with whom she was placed by the Order of the 22nd of March last, with permission to the Mother to visit and see her at Mr. *James Skinner's* house (unaccompanied otherwise than by her necessary and usual attendants), daily, if so disposed, and for a reasonable period of time during each visit.

From this Order the Petitioner and Mr. *John* appealed to the High Court of Judicature for the *North-Western Provinces,* and the appeal was heard on the 7th of July, 1870, when the High Court was pleased to confirm so much of the Order of the Judge of *Meerut* as directed the removal of the Minor from the custody of her Mother, but cancelled the rest of the Order, and postponed passing final Order on the appeal for a fortnight, to enable the parties to nominate to the Court a fit and proper person to receive a certificate of administration to the estate of the Minor, and also to nominate a fit and proper person to be appointed Guardian of the person of the Minor. On the 4th of July, 1870, the Petitioner's Daughter was examined by the Officiating Chief Justice and one of the Judges of the High Court, and, as alleged by the Petitioner, expressed a strong desire to return to the Petitioner, and seemed much distressed at the idea of being separated from her: that on the 16th of July, 1870, the High Court made a further Order, appointing Miss *Scanlan* Guardian of the person of the Petitioner's Daughter, and directing that she should be taken by the Peti-

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tioner, Mrs. *James Skinner*, and delivered into the charge of Miss *Scanlan:* that on the same day the High Court made a further Order, appointing Mr. *Bailey*, of the *Agra Bank*, Guardian of the property of the Petitioner's Daughter. Pursuant to the first of these Orders, of the 16th of July, the Petitioner's Daughter had been taken to and placed in the charge of Miss *Scanlan:* that before the Petitioner's Daughter was placed in the care of Mrs. *James Skinner*, by the Order of the 22nd of March, the Petitioner and her Daughter had always lived together, and had never been separated for more than a few hours, the Petitioner and her Daughter entertaining a very strong affection for one another, and that the separation which had taken place had caused, and was still causing, very great mental pain, and even physical illness, to the Petitioner's Daughter: that, being dissatisfied with the three last-mentioned Orders of the High Court, the Petitioner and Mr. *John* applied to the High Court for leave to appeal to Her Majesty in Council; but the High Court, by an Order of the 29th of August, 1870, dismissed the application, on the ground, that Mr. *John* had no *locus standi*, and that the Petitioner was not entitled to appeal as a matter of right, as the Orders did not involve property of the value of £1,000, and declined to certify that the case was a fit one for appeal to the Privy Council: that the Petitioner felt aggrieved by the above Orders of the High Court of the 7th and 16th of July which affected the civil rights of the Petitioner and her Daughter, which cannot be measured by a money standard, and involved important questions of law; and also by the Order of the 29th of August, refusing the Petitioner leave to appeal, and, in consequence of such last-mentioned Order, it was necessary to apply for special leave to appeal against the Orders: that should the Petitioner obtain such leave to appeal, it will necessarily be some considerable time before such appeal could be heard, and that, in the meantime, unless execution of the Orders of the High Court was stayed, the Petitioner would for a long time be deprived of the society of her Daughter and only child, and her Daughter would remain among strangers, and be alienated from the Petitioner: the Petitioner, therefore, prayed for special leave to appeal from the Orders of the High Court of Judicature for the *North-Western Provinces* of the 7th and 16th of July, that exe-

cution of such Orders might be stayed, and that the Petitioner's Daughter might be permitted to return to and live with her pending such appeal, or for further relief in the premises.

The petition was supported by the joint declaration of the Petitioner and *John Thomas John*, her alleged Husband, and was accompanied by translations of the correspondence between the parties relative to the custody of the person and property of the minor, and the proceedings, petition, and depositions had thereon, with the judgment of the Judge of the District Court of *Meerut*, and of the High Court of Judicature for the *North-Western Provinces*, both of which detailed very fully the grounds of their decision, and the Orders thereon, which were now sought to be appealed from.

Sir *R. Palmer*, Q.C. (Mr. *Cave*, with him), for the Petitioner:—

This is an application under the special powers reserved to the Crown by the Statute, 3 & 4 Will. 4, c. 41, s. 4. There is no right of appeal under the Letters Patent establishing the High Court of Judicature in the *North-Western Provinces*. The Order of the Court below removes the Minor from the custody of the Petitioner, her Mother, on the ground, that she being a Mahomedan, the Minor is being induced to embrace the Mahomedan faith. In a similar case before this Tribunal, *Camilleri* v. *Fleri* (1), from *Malta*, leave to appeal was given against an Order for the removal of children from the custody of their parent. Although not an appealable grievance by the Letters Patent establishing the High Court, leave to appeal has in analogous cases been allowed under the general power of the Statute, 3 & 4 Will. 4, c. 41, s. 4: *Shire* v. *Shire* (2); *D'Orliac* v. *D'Orliac* (3).

THE LORD JUSTICE JAMES:—

Enough appears from the petition to induce their Lordships to grant special leave to appeal. Such leave, however, must be without prejudice to any application to the Court below by the Petitioner, as she may be advised to make, to have access, at suitable times, to her Daughter.

(1) 5 Moore's P. C. Cases, 161. (2) Ibid. 81.
(3) 4 Moore's P. C. Cases, 374.

J. C. 1870 *In re* SKINNER.

By an Order in Council made on the petition, leave was given to the Petitioner to prosecute her appeal against the Orders of the High Court of Judicature for the *North-Western Provinces* of the 7th of July and the 16th of July, 1870, on giving the usual security; with liberty, pending the appeal, to make application to the High Court of Judicature for the *North-Western Provinces* for leave for the Petitioner, the Mother, to have access at suitable times to her Daughter.

Solicitors for the Petitioner: *Watkins & Lattey.*

J. C.* 1870 *Dec.* 12.

JAMES BROWN . . . . . APPELLANT;

AND

ALEXANDER McLAUGHAN . . . . . RESPONDENT.

ON PETITION FROM THE SUPREME COURT AT SOUTH AUSTRALIA.

Special leave to appeal—Grounds for—Matter involving question of general public interest on construction of a Colonial Act.

4PC545.

Special leave to appeal (the sum involved being below the appealable amount) allowed, on the ground that the question involved the construction of a Colonial Act which affected the interests of a large class in the Colony for which the Act was passed.

In granting the special leave the Judicial Committee limited the appeal to the construction of the Colonial Act.

THIS was an *ex parte* application for special leave to appeal.

The Plaintiff was the Lessee of several large tracts of land known as "Sheep runs" in *South Australia,* under leases from the Crown granted for pasturage purposes, in which manner a great portion of the land of *South Australia* is leased out. One of the Plaintiff's runs adjoined a run occupied by the Defendant, and some time before the commencement of the action the Plaintiff erected a wood and wire fence between his run and that of the Defendant; and the Plaintiff claimed a contribution from the Defendant on account

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), and SIR JOSEPH NAPIER, BART.

of this fence, under the 4th section of the *South Australian Fencing Act* of 1865 (29 Vict. No. 6), which provides "that when any occupier of land has heretofore availed himself, or shall hereafter avail himself, of any fence, not being a party fence, dividing such land from the land adjoining; the occupier in possession shall, upon demand, be liable to pay to the Owner of such dividing fence one-half part of the value, at the time of such demand, of so much of such fence as shall abut on the land so occupied as aforesaid." At the trial it was admitted, that the fence in question was a dividing fence and had been erected by the Plaintiff at his own expense, that the Defendant was the occupier of the adjoining land, and that he had availed himself of the fence in question. The Plaintiff also proved the erection of the fence by himself and the cost of it. The jury found a verdict for the Plaintiff for £184. A rule *nisi* was subsequently obtained, calling on the Plaintiff to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground of misdirection in the Judge having directed the jury that there was uncontradicted evidence of the Plaintiff that he was the owner of the fence. This rule was argued, and in the result, the Supreme Court ordered the verdict to be set aside and a nonsuit entered, on the ground, that this Act did not apply to fences erected by pastoral Lessees.

This was the judgment from which the Plaintiff in the Court below applied for special leave to appeal against. The Petitioner alleged, that according to the above Act of the Local Legislature of *South Australia* he was entitled to claim and recover from the occupiers of the lands adjoining the half value of the fencing so erected by him, and submitted that the questions involved in the action were of considerable importance, not only to him, but also to the whole of the Lessees from the Crown of land for pastoral purposes.

Mr. *J. Cunningham*, in support of the application:—

There are several grounds on which this Tribunal has permitted departures from the rule relating to appealable value. These were, first, where the matter in dispute involved an important principle or point of law; secondly, where it involved similar interests of a large class of persons; thirdly, where, though the amount immediately

J. C. 1870 BROWN v. MCLAUGHAN.

involved is below the appealable value, £500, the matter indirectly involves an equal or greater sum; and, lastly, where the rights of the Crown or of a Colonial Government are involved. All these grounds existed in this case. In the first place an important question of law is involved, viz., as to the construction of the Act of 1865, 29 Vict. No. 6, on a point which affected the interests of a very large class of persons in the Province for which alone this Act was passed, bearing in mind the fact, that a very considerable portion of the Territory of *South Australia* was leased out to what are termed "Pastoral lessees." Then, certainly, it involved a sum much larger than the appealable amount as stated in the petition of appeal, the Plaintiff having erected many other fences of a similar kind, for which he cannot recover contribution if this decision stands. It is submitted that the same principle would be involved in these cases if other actions were brought. Moreover, there was the irregularity, if not fatal error, in the proceedings, namely, the ordering a nonsuit to be entered without leave reserved, which is contrary to a well-established Common Law rule of practice; and moreover, the Order, while purporting to be made in pursuance of the rule, was a flagrant departure from it; the rule being a rule to shew cause why the verdict should not be set aside and a new trial had between the parties on the ground of misdirection, whereas the Order was to set aside the verdict and enter a nonsuit.

SIR JAMES W. COLVILE:—

Their Lordships are disposed to grant leave to appeal, on the ground, that it is a question on the construction of an Act, and one of general interest in *South Australia*. It being understood that the appeal is to be confined to the merits of the decision, namely, whether the *South Australian Fencing Act* applies to fences erected by holders of leases under the Crown for pastoral purposes.

Solicitors for the Petitioner: *Torr, Janeway, & Tagart.*

In re HOUGHTON'S PATENT.

J. C.*
1871
Feb. 1.

Letters Patent—Prolongation—Practice—Accounts.

Prolongation of term of Letters Patent for seven years, the invention being a meritorious one, and of great value as a raw material for the manufacture of paper; no profit having been made either by the Inventor or his Assignees.

The statement of accounts furnished being *primâ facie* satisfactory, the Petitioners were allowed to prove the merits of the invention before going into the accounts.

In re Saxby's Patent (1) distinguished.

THIS was an application by the *Gloucestershire Paper Company*, a Joint Stock Company, limited, the Assignees of the Patentee, *Houghton*, for a prolongation of Letters Patent, dated the 17th of February, 1857, for "Improvements in the preparation of materials used in the manufacture of paper."

The invention consisted in submitting wood, or vegetable woody fibres, to the action of caustic alkali heated under a closed Boiler. The Patentee discovered that slices cut from logs of ordinary wood, such as Pine, Beech, Elm, or other common kinds, when broken up and digested in the Boiler, are in a few hours reduced to a kind of pulp, all the matters, except the woody fibres, are dissolved away, leaving a fibrous pulp, which is found to be a very good substitute for Rags, or the *Esparto* grass, commonly used in the manufacture of paper. It was stated, that the price of Rags was about £28, and of *Esparto* grass about £10 per ton, while Wood, by the Patentee's process, could be effectually used as a raw material for paper at a cost of £1. 10*s.* per ton, and that three tons of Wood would go as far as one and a half tons of Rags in making the paper.

Mr. *Grove*, Q.C., and Mr. *T. Aston*, for the Petitioners, and

Mr. *Archibald*, for the Crown.

After evidence had been given describing the nature of the

* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, and SIR JOSEPH NAPIER, BART.

(1) *Ante*, p. 292.

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In re HOUGHTON'S PATENT.

patented invention, the Petitioner's Counsel was about to call witnesses to shew the peculiar merit of the invention, when,

Mr. *Archibald* objected to the reception of such evidence, until the accounts had been satisfactorily proved, referring to the course adopted in *Saxby's Patent* (1), which had been since followed in *Clark's Patent* (2).

Mr. *Grove*, on behalf of the Petitioners, urged, that the universal practice before those cases, had been for the Petitioner to prove the general merits of the invention before entering upon the question of accounts.

THE LORD JUSTICE MELLISH:—There appears no objection to that course; the Petitioner's Counsel have a right to put the case before their Lordships in the way they think most advisable.

THE LORD JUSTICE JAMES:—Their Lordships think, that the cases of *Saxby's Patent* and *Clark's Patent*, cited by Mr. *Archibald*, only go to this extent, that where there are special statements which shew upon the face of the accounts, that the Petitioners have, in fact, made very large profits by their invention, as was the fact in both those cases, such circumstance is sufficient for their Lordships at once to determine the application without going into the question of the merits of the invention. In the present case, there seems no reason for departing from what appears to have been the more usual course in applications like the present.

Evidence was then given of the merit of the invention, and the accounts were put in, and witnesses examined respecting them. It appeared, that the Petitioners became Assignees of the Patent in 1866, and gave the Patentee in consideration, about £1,000, and also 121 paid-up shares in the Company, the value of each share being nominally £50. The accounts of the Petitioners shewed, that the Company had expended upwards of £30,000 in Buildings and machinery with the object of working the patented invention, and that in each year since 1866 they had lost large sums of money, though their losses had gradually become less in each year relatively to their outlay, but notwithstanding neither

(1) *Ante*, p. 292. (2) *Ante*, p. 421.

the Patentee, who endeavoured to work the invention during the first part of the term of the Patent, nor the Assignees, during the latter part of the term, had been able to work it so successfully as to make any profit. It was stated in evidence, that the Company had now a good prospect of success and of reimbursing themselves for their outlay, if the Patent was prolonged. The Patentee put in his own accounts, which shewed that he had lost considerable sums of money in endeavouring to work his invention, and had received no dividends on his paid-up shares in the Petitioners' Company.

Their Lordships' judgment was delivered by

THE LORD JUSTICE JAMES:—

In this petition their Lordships are of opinion, that the Petitioners have made out a case entitling them to a prolongation of the Letters Patent. It appears to their Lordships, that the discovery is one of great importance, inasmuch as it is the application of a very valuable new material for the purpose of making paper pulp, which material is fibrous and not cellular, being produced from wood, a material which nobody ever supposed to be capable of producing such pulp; and produced by a process which has been shewn to be practically efficient for the purpose; and which, if it answers (and there seems a probability that if the Trade could be induced to adopt it, it must) will be a great public benefit, inasmuch as it is a valuable addition to the number of raw materials in a Trade in which raw materials are very scarce and dear. Of the merit of the invention their Lordships are satisfied. With respect to the objection to the accounts, to which Mr. *Archibald* very properly drew their Lordships' attention, we do not conceive this to be a case like *Saxby's Patent* (1) or *Clark's Patent* (2), which were both before this Board some short time ago, in which the accounts given of the receipts and profits which had been made were wholly unsatisfactory upon the face of the application.

In this case, the accounts have been rendered in the best way in which they could be rendered, to explain why it is that there has been no profits. The fact seems to be, that no profit whatever has

(1) *Ante*, p. 292. (2) *Ante*, p. 421.

J. C. 1871 — *In re* HOUGHTON'S PATENT.

been made, either by the Patentee himself—except so far as he has shares in this Company—or by the Company. It appears, that the Patentee has spent a great part of his life, and a great deal of his money, in trying to bring his patent invention into use, and it also appears, that since the Patent has been assigned to the present Petitioners, a Joint Stock Company, they have really spent a great deal of money in a *bonâ fide* endeavour to make the invention known, and to bring it into public use, hitherto without profitable result either to the Patentee or to the Company.

Their Lordships think, therefore, that the Petitioners have made out a case for the prolongation, and, having regard to the fact that, in truth, the Patentee and the Company have gone on for nearly fourteen years without any result whatever, except loss in labour and capital, their Lordships are prepared to recommend to Her Majesty that the Patent be prolonged for the term of seven years.

Solicitors for the Petitioners: *Wilson, Bristows, & Carpmael.*
Solicitors to the Treasury, for the Crown.

ALEXANDER RODGER, CHARLES CARNIE, AND RICHARD JAMES GILMAN . } APPELLANTS;

AND

THE COMPTOIR D'ESCOMPTE DE PARIS AND THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA . . . } RESPONDENTS.

J. C.*
1871
Jan. 23.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Reversal of judgment—Order in Council, construction of—Repayment of amount of judgment—Interest—Restitution—Costs—Appeal—Practice—Printed cases.

By an Order in Council made on an appeal, the judgment of the Supreme Court at *Hong Kong*, in an action of Trover, was reversed, and a nonsuit directed to be entered, whereof "the Governor, Lieutenant-Governor, &c., for the time being, and all other persons whom it may concern, were to take notice and govern themselves accordingly." On the receipt of this Order in the Colony, the successful Appellant, to carry the Order into execution, applied to the Supreme Court for an Order for repayment of the amount of the judgment, with interest upon the whole sum paid by way of principal and interest by the Appellant. The Supreme Court was of opinion, that as there were no express directions in the Order in Council for payment of interest on the judgment, it had no power to allow interest, and refused to make any Order thereon:—

Held, reversing such decision; that although by the terms of the Order in Council the judgment of the Supreme Court was only reversed, and a nonsuit directed to be entered, yet, (1) that interest upon the judgment was to be implied under the general words there used; and (2) that inasmuch as under the general Regulations of 1845, applicable to appeals from *Hong Kong* to the Queen in Council, the Supreme Court is to execute and carry into effect the judgments and Orders of the Queen in Council, that Court had power, without more, to have ordered payment of interest; as otherwise the successful Appellant would not be restored to all he had lost by reason of the judgment being reversed.

Leave to appeal had been granted by the Court below from the Order refusing interest: but the Appellant petitioned the Queen in Council praying that the Judicial Committee might determine the matter as related to the claim for interest:—

Held, that, if the original Order did not impliedly give interest, and as an

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* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

J. C.
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appeal had been granted from the Order refusing it, the more convenient course would be to bring the question before the Judicial Committee on the original appeal. This was agreed to, and the case directed to be argued, without printed Cases, on the materials furnished by the Record of the proceedings on the application to the Court below to carry out the Order in Council.

THIS was an application for the purpose of carrying out the Order in Council made on the appeal in this case.

The facts have been already reported (1).

By the Order in Council made on the appeal, it was ordered, that the judgment of the Supreme Court at *Hong Kong* of the 3rd of June, 1867, should be set aside, together with the verdict, and that a judgment of nonsuit should be entered in lieu thereof, whereof the Governor, Lieutenant-Governor, &c., of the Island of *Hong Kong*, for the time being, and all other persons whom it might concern, were to take notice and govern themselves accordingly.

The Defendants having paid the Plaintiffs the amount of the judgment and the costs, in the action upon which judgment of nonsuit was thus ordered to be entered, a motion, founded on the Order in Council, was made by the Defendants in the Supreme Court at *Hong Kong* for a rule for repayment of the sum of $56,390·12, the amount of the judgment so paid on the 25th of September, 1867, and interest thereon from that date at the rate of 12 per centum per annum and of $6,336, the costs of the action paid on the 9th of November, 1867, with like interest from that date; and also for payment of the sum of $3,593, the amount of the Defendant's taxed costs, without interest, making together the sum of $66,266, and that the Defendants might issue execution for those respective sums.

On the 16th of June, 1869, the Chief Justice *Smale* gave judgment as follows:

"Upon the report of the Judicial Committee, Her Majesty in Council, on the 17th of March, 1869, ordered that a judgment of nonsuit should be entered in this Court in lieu of the judgment for the Plaintiffs. It appears to me, that, in obedience to that Order, it is my duty (a nonsuit having been accordingly entered) to carry out that nonsuit by an Order, and as nearly as practicable to make that nonsuit available in every respect for the Defendants now, as

(1) Law Rep. 2 P. C. 393.

if it had been entered on the 3rd of June, 1867. I have no doubt that it is my duty to order, and I do order, that the sums of $56,390 and $6,336 be repaid by the Plaintiffs to the Defendants, and also that the sum of $3,593, the Defendants' costs in this Court recently taxed, be paid by the Plaintiffs to the Defendants: no interest is asked for on this last-mentioned sum. But the Defendants claim interest on the two former sums. On the question thus raised much argument has been offered. Taking into consideration the able arguments on each side, I proceed to review the general doctrine as to interest, and to apply it to the questions now before me. It appears that, in the absence of any contract for it, or of documentary or other evidence from which an actual agreement to pay interest might be inferred, interest was not payable at Common Law on any debt. By the 3 & 4 Will. 4, c. 42, sec. 30, provision was made for giving interest where not actually contracted for. By that Act the jury trying the case are authorized, if they think fit, to allow interest to the Plaintiffs if the debt is payable on a day certain, or from demand made when uncertain. And by 1 & 2 Vict. c. 110, sec. 17, judgment debts are to carry interest, and execution may be issued for judgment debts and interest. It appears to me that no interest is recoverable at Common Law in this case, and the words of neither of these Statutes extend to the case of a nonsuit, or to repayment of money erroneously paid under a judgment which is reversed. Such a case as the present is very unusual, and would seem to be a *casus omissus* in our Statute law, and I am of opinion, that no power vests in this Court to give the interest as asked. The Order will be for payment of the three sums, making together $66,266, with the costs of entering up the nonsuit and of this motion. The case of *Page* v. *Newman* (1) was referred to, but there Lord *Tenterden* expressed an opinion, that a Court of Error could give the interest, which would be recoverable in the Court below. It is not for me to speculate as to the power of the Judicial Committee of the Privy Council to give the interest asked, it is enough for me to decide that this Court has no such power."

The Appellants applied to the Supreme Court for leave to

(1) 9 B. & C. 381.

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appeal against the Order of that Court refusing to grant a rule for payment of interest, and such leave was granted.

The Appellants afterwards presented a petition to Her Majesty in Council, which set out the above facts, and further stated, that the Respondents were Bankers, and had had the possession and use of the above sum of $56,390·12 from the 25th of September, 1867, until it was repaid on the 24th of September, 1869, and of the sum of $6,336·47 from the 9th of November, 1867, until it was repaid on the 24th of September, 1869, and that the Appellants had been deprived during that time of the benefit and advantage of those several sums to which they were declared legally entitled by the Order in Council of the 17th of March, 1869, and prayed that Her Majesty in Council would refer the Petitioners to the Judicial Committee to hear and determine the matter, and to Order the payment of interest on the two several sums of $56,390·12, and $6,336·47, with interest upon the amount paid by the Appellants pending the appeal, or for such further or other Order as might appear just and proper.

J. C.* 1870 *Jan.* 26.

Sir *R. Palmer*, Q.C., Mr. *Manisty*, Q.C. (Mr. *Baylis* with them), for the Petitioners:—

The object of this application is for a supplemental Order directing payment of interest upon the amount of the judgment and costs paid by the Petitioners on the judgment of the Court below, which was reversed, with costs, by this Tribunal. If the Judicial Committee had known that the judgment debt and costs had been paid, interest would have been allowed and decreed, as a matter of course. [SIR JOSEPH NAPIER:—Ought not the Petitioners, the then Appellants, to have informed this Court of those payments at the hearing of the appeal?] It was an action of Trover, and the judgment debt and interest has been paid; that fact was unknown to the Appellants at the time when the judgment in their favour was pronounced by this Court, they would otherwise, of course, have applied for interest on the sums paid. The judgment of this Court was simply one of nonsuit. The Order in Council is inchoate, and being imperfectly carried out, this Tribunal has power

* *Present*—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

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to add to and complete it. If the Order in Council is not properly carried into execution, this Court will recommend a fresh Order to enforce it (1). By refusing to give interest, the Court below has failed to give proper effect to Her Majesty's Order in Council. We submit, that the proper mode to obtain the amendment of the Order is that we have taken, namely, applying to this Tribunal by petition. We have, however, obtained leave from the Court below to appeal against this Order, if the Committee should think that course necessary.

LORD WESTBURY:—

It appears that a new question arose in the Court below, when the Order in Council was sought to be enforced, namely, whether interest should be paid on the repayment of the amount, the result of the verdict, and costs. It appears to us, that there was a miscarriage of justice in carrying out the Order in Council. We are disposed to think it a case for a supplementary appeal.

Mr. *Kay*, Q.C., and Mr. *Holl*, who appeared for the Respondents, consented to the petition being converted into an appeal.

THEIR LORDSHIPS directed, that the Record of the proceedings in the Court below on the application for interest should be printed, but, in the circumstances, dispensed with the parties lodging printed Cases.

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In accordance with that direction, the Record was lodged, and the case now heard.

Sir *R. Palmer*, Q.C., and Mr. *Manisty*, Q.C. (with them Mr. *Baylis*), for the Appellants:—

Interest was a necessary incident upon the reversal by this Tribunal of the judgment of the Court below, and ought, as a matter of course, to have been ordered by the Supreme Court at *Hong Kong*, in carrying out the Order in Council made in pur-

* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

(1) See *In re Rajah Vassareddy Lutchmeputty Naidoo* (8 Moore's P. C. Cases, 115), where a peremptory Order was issued ordering the Court below forthwith to carry into execution an Order in Council made on the appeal.

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suance of such judgment of reversal. Though not expressed in the Order, it was necessarily implied, as without it substantial justice could not be done. The terms of the Order were sufficient to entitle the parties to the full benefit of the judgment, which, according to the principles of the Civil Law, could only be a *restitutio in integrum*. A similar question arose in the House of Lords in *Hopwood* v. *Hopwood* (1). There, upon the reversal of the Lords Justices' decree (2), it appears from the Registrar's Book that interest was paid without any application for an Order by the Court of Chancery. So in *Blake* v. *Mowatt*, which is a case that has not been reported, on a reversal by the House of Lords of a decree which had been enforced; a petition was presented to the Master of the Rolls for restoration of the money, and interest thereon, which the Court ordered. One of the strong grounds in this case for the allowance of interest, is the fact, as stated in the petition to the Court below, and not denied, namely, that the Respondents are Bankers, and must be presumed to have used the money in their business. It is not in dispute that the amount of the judgment was paid at the Respondents' demand, not voluntarily, by the Appellants, and that the stipulations contained in the additional instructions in the Order in Council of the 21st of January, 1846, regarding appeals from *Hong Kong*, which provide for security being given if execution of a judgment appealed from is obtained, were not properly complied with. By section 3 of the *Hong Kong* Ordinance, No. 15, of 1844 (3), the law of *England* is in force in that Island, and is the practice of the Supreme Court. By the English law, interest in such a case as this would have been awarded. In *Sympson* v. *Juxon* (4), it was held, that if judgment be reversed on error, a writ of restitution will be

(1) 7 H. L. C. 728.
(2) 26 L. J. (Ch.) 292.
(3) That section is as follows: "If such leave to appeal shall be prayed by the party or parties who is or are adjudged to pay any sum of money or to perform any duty, the said Supreme Court shall direct that the judgment, decree, or sentence appealed from shall be carried into execution, if the party or parties Respondent shall give security for the immediate performance of any judgment, decree, or sentence which may be made or pronounced by us, our heirs and successors, in our or their Privy Council upon any such appeal; and until such security be given the execution of the judgment, decree, order, or sentence appealed from shall be stayed."
(4) Cro. Jac. 699.

awarded to inquire what profits the party has taken, *colore judicii prædicti*. And the Court there expressly declares that "the Plaintiff in the Writ of error, after reversal, is to be restored to all he lost." [LORD CAIRNS:—In the cases of *Rajah Lelanund Singh* v. *Maharajah Luckmissur Singh* (1), and *Kirkland* v. *Modee Peston-jee Khoorsedjee* (2), sums found due for mesne profits were held, as judgment debts, to carry interest.] Even before the passing of the *Common Law Procedure Act*, 1852, which, by s. 150, makes proceedings in Error a *supersedeas* of execution from the time of service of the Master's note, the law was, in effect, the same. Thus, in *Belshaw* v. *Marshall* (3), a Sheriff executing a *fi. fa.*, after notice of the allowance of a Writ of error, was held liable in trespass, though there had been no further *supersedeas* of the execution. In *Levy* v. *Langridge* (4), the Court of Exchequer decided, that where judgment is given in a Court of Error for the Defendant in Error, the Court is bound, under 3 & 4 Will. 4, c. 42, s. 30, to allow interest for the time that execution has been delayed by the Writ of error. Interest is paid for such time as execution has been delayed; 1 & 2 Vict. c. 110, s. 17. We ask also for interest upon the costs we have paid in the Court.

Mr. *Kay*, Q.C., and Mr. *Holl*, for the Respondents:—

As the Order in Council contained no direction for the payment of interest on the amount of the judgment, the Supreme Court had

(1) This case was heard on the 15th of July, 1870, before Lord Cairns, Sir James William Colvile, Sir Joseph Napier, Bart., and Sir Lawrence Peel.

The appeal arose out of the case of *Rajah Lelanund Singh, Bahadoor* v. *Maharajah Moheshur Singh, Bahadoor* (reported 10 Moore's Ind. App. Cases, 81), which was a suit for possession of lands and *wasilat*, or mesne profits. By an Order in Council, made on the recommendation of the Judicial Committee, the decree of the then *Sudder Dewanny Adawlut* was reversed, and the suit remitted to *India*, subject to certain inquiries directed to be made by that Court. On a petition to the High Court of Judicature at *Calcutta*, which had superseded the *Sudder Dewanny* Court, for execution of the Order in Council, possession, and payment of *wasilat*, the presiding Judge decreed possession, but refused to allow the successful Appellant mesne profits, on the ground that no provision was made by the Order in Council for mesne profits. The Judicial Committee held, that the right to mesne profits was consequential to the declaration in the Order in Council decreeing possession.

(2) 3 Moore's Ind. App. Cases, 220.

(3) 4 B. & Ad. 336.

(4) 4 M. & W. 337.

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no power to award interest. It cannot be successfully contended, that it is an incident to the Order in Council. If interest was intended to be demanded, it ought to have been applied for on the hearing of the appeal. It is admitted that the English Law applies. By analogy to the practice here, after reversal of a judgment of a Common Law Court there is a regular mode of proceeding by the Plaintiff in Error by a Writ to the Sheriff to give restitution, or levy: *Lush's* Practice, p. 675 [3rd Ed.]; *Archbold's* Q. B. Practice, p. 643 [12th Ed.]. In *Tidd's* Forms, p. 586 [8th Ed.], the form of a Writ of restitution is set out. It is by *sci. fa.*, and directs that "*C. D.* should be restored to all things that he has lost by occasion of that judgment;" that only means the return of the thing or money. *Sympson* v. *Juxon* (1), relied on by the Appellant, was a case relating to land, and is distinguishable from the present, which relates only to money. Interest is nowhere mentioned in any of the cases on this subject as demandable at Common Law. Thus, in *Eyre* v. *Woodfine* (2), a Termor for years was outlawed, he was restored to the term on reversal of the outlawry, but without mesne profits. In *Bacon's* Abr., tit. "Error," M. 3, it is laid down, that if a term for years is sold by the Sheriff, and the judgment be reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself. In Courts of Equity, on reversal of a decree, interest is given only in special circumstances. The true rule is stated in *Parker* v. *Morrell* (3), that where a decree or Order under which money has been paid is reversed on appeal, the money is in general ordered to be repaid without interest. [SIR JOSEPH NAPIER:—Suppose, in this case, as the Respondents are Bankers, that the money paid for the judgment and costs has been used by them in their business, and they have received interest thereon.] *Wolfe* v. *Findlay* (4) is an answer to that question. There a *London* Firm, Bankers and Agents of a Firm in *India*, had assets belonging to a deceased's estate in their possession. For a period of ten years the assets had been mixed with their moneys; as no application had been made to pay the money into Court, it was held, that the *London* Firm was not liable to pay interest. So

(1) Cro. Jac. 699.
(2) Cro. Eliz. 278.
(3) 2 Phillips, 453.
(4) 6 Hare, 66.

in *Lord Chedworth* v. *Edwards* (1), which was cited in the former case, an Agent, who, by desire of his Principal, kept large sums of money in his hands, for which he was to be responsible, paying from time to time, and duly accounting, was declared not liable to pay interest, even supposing, as the Court said, he had employed the money for his own interest. These authorities establish the proposition, that interest is not an incident of the possession of money, and is only given where specially provided, either by contract expressed or implied. When interest is given by Statute, as in 3 & 4 Will. 4, c. 42, s. 30, and 1 & 2 Vict. c. 110, s. 17, it is by way of damages. *Levy* v. *Langridge* (2) shews that, before the former Statute, it was in the discretion of the Court to allow interest. This Tribunal can do no more than the Supreme Court could do. The Supreme Court of *Hong Kong* had no power under the Order in Council, or the General Regulations of 1845, regarding appeals from that Island, to award interest, unless specifically directed. The case of *Blake* v. *Mowatt*, relied on by the Appellants, differs from this. There the terms of remit directed the Court of Chancery to do what justice required; and there being a fraudulent representation, and a personal liability, it was a case which would justify a Court of Equity decreeing interest.

LORD CAIRNS:—

In this case an application was made to their Lordships some time since by petition by persons who were Appellants in the year 1869 before this Tribunal, and upon whose appeal a judgment of the Court at *Hong Kong* was reversed, and the application made by the petition was, that the Court at *Hong Kong* might order not merely restitution of the money which had been paid under the original judgment, but also interest upon all the sums they had paid. Their Lordships, when that petition came before them, were of opinion that the Record ought to be printed; and they dispensed with the printing of any Cases by the parties, and they thought that when the Record was printed they would be in a position to dispose of the questions raised by the petition. That question is one of considerable importance, not only to the parties in this case, but with reference to the general practice of primary Courts. It

(1) 8 Ves. 48. (2) 4 M. & W. 337.

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arises in this way. Upon the 3rd of June, 1867, in an action of Trover brought against the Petitioners by the Respondents, a verdict was given by the jury for $56,390·12 as principal, and $6,336·47 as interest, with a further sum for costs. Thereupon, the Defendants in the action, the present Petitioners, applied to the Court at *Hong Kong*, by a rule, for a new trial or for a nonsuit. That rule was refused with costs upon the 29th of June, 1867. A very few days afterwards, on the 2nd of July, 1867, the present Petitioners applied to the Court for leave to appeal, and leave was granted on the 5th of July, 1867. Now, in that state of things, it was in the option of the Plaintiffs in the action, the Bank, either to have allowed the sum which they have been awarded to remain in the hands of the present Petitioners, or to insist upon execution of the judgment, giving security to abide by any Order that Her Majesty in Council might make. The general Regulation gave them that option. They had the right to execution, giving the security of the kind that I have mentioned. They were fully aware, from the application for leave to appeal which has been stated, that an appeal was about to be brought. They obtained execution of the judgment, and received the sum of money which they were awarded. Her Majesty, by an Order in Council, acting upon the recommendation of their Lordships, ordered that the judgment of the Court below should be reversed, and that a nonsuit should be entered. The Order of Her Majesty did not in express terms go further, except to say, that "the Governor, Lieutenant-Governor, and Commander-in-Chief of the Island of *Hong Kong*, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly." But the general Regulation applicable to *Hong Kong* provided, in the last sentence of the Regulation of 1845, that "the Supreme Court should, in all cases of appeal to Her Majesty, Her heirs and successors, conform to, execute, and carry into immediate effect such Judgment and Orders, as Her Majesty, Her heirs and successors in her or their Privy Council, should make thereupon, upon the appeal, in such manner as any original judgment or decree of the Supreme Court can or may be executed."

The result is this, that in the opinion of their Lordships it was in the power, and it became the duty, of the Court at *Hong Kong*

to do everything, and to make every Order which was fairly and properly consequential upon the reversal of the original judgment by this Tribunal. The Supreme Court at *Hong Kong* has entertained no doubt that it had the power, and that it was its duty, to order restitution of the principal sum that was paid over, and all the costs that were paid over under the judgment. But it has held the opinion, that it had not the power to order any payment of interest upon any part of the sum paid over by the present Petitioners to the Respondents. The question which their Lordships have to consider is, whether the Court at *Hong Kong* had or had not that power to order payment of the interest, and if so, whether in this case it was or was not proper to exercise that power?

Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

It is contended, on the part of the Respondents here, that the principal sum being restored to the present Petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the Petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the Petitioners, and that the perfect judicial determination which it

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must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

It is said, however, that there is no authority for ordering the payment of interest. The cases of Writs of error which have been referred to can hardly be considered as precedents for a case of the present kind. The proceeding upon them was of a highly technical character. It was a matter of great rarity for a Writ of error not to suspend execution in any case, where execution had not actually taken place before the Writ of error was brought. Restitution no doubt was ordered, and it may well be that under the term "restitution," in the case of a money payment, interest was not given by the Court which carried the restitution into effect. But whether that be so or not, their Lordships do not think it necessary to inquire further into that matter. Upon proceedings which are much more analogous to the present, undoubtedly interest has been given. One case has been mentioned, in the House of Lords, the case of *Blake* v. *Mowatt*, in which money, which had been ordered to be paid under a decree—money consisting itself of principal and interest, that decree having been reversed in the House of Lords—was ordered by the Court below to be restored, together with interest upon the capital sum. It probably would be found that that case is by no means a solitary case in the practice of the House of Lords. Their Lordships have reason to believe that the practice of the Courts in *India*, when there has been a reversal in this Country, and when money has been ordered in *India* to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest. They are quite satisfied, that this practice is in accordance with the true principle to be applied to this case, and with what the justice of such a case demands, and they think that is pre-eminently so in a case in which the money in the first instance was ordered to be paid by the Defendants in the action, with interest, during the time that the money had been in the Defendants' possession after the conversion of the goods.

Their Lordships, therefore, consider that it will be their duty on this petition humbly to report to Her Majesty that the Court below, in addition to ordering the repayment of the principal, should have ordered the payment of interest; and their Lordships further think that interest should be calculated not merely upon what was the original principal sum, but upon the whole sum paid by way of principal and interest by the Defendants in the action to the Plaintiffs. Their Lordships can see no sound ground for making a distinction in that gross payment between the principal and the interest. There, however, their Lordships would stop. They do not consider that interest should be paid upon the costs, because it has never been, in any proceeding that their Lordships are aware of, the habit in ordering the refunding of costs paid under a decree to order that refunding with interest, and there may be obvious reasons applicable to the case of costs differing from the reasons which applied to gross payment of another description.

Their Lordships further consider, that the present petition having raised a point which was one of some novelty, upon which, perhaps not unnaturally, the learned Judge of the Court below entertained a doubt as to what his precise powers were, and a trifling expense only having been incurred by the form in which the case has been brought before their Lordships, their Lordships will do right in not saying anything as to the costs of this application, but leaving each party to bear his own costs.

THEIR LORDSHIPS reported, that in obedience to Her Majesty's General Order in Council of the 11th of November, 1869 [referring the original appeal to the Judicial Committee], they had taken the petition and appeal into consideration; and having heard Counsel on both sides on the record, their Lordships were of opinion, that the Order of the Chief Justice of *Hong Kong*, of the 16th of June, 1869, ought to be varied by directing that Court to add to the sums repaid by the Respondents to the Appellants for principal and interest, the interest due on the said sums at the rate usually allowed by the Supreme Court of *Hong Kong*, from the 25th of September, 1867, to the 24th of September, 1869, for the principal, but no interest was to be allowed on the sum repaid by

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the Respondents to the Appellants for costs, and that each party was to pay their own costs of the appeal. By an Order in Council, dated the 8th of February, 1871, the above report was confirmed by Her Majesty.*

Solicitors for the Appellants: *Reed, Phelps, & Sidgwick.*
Solicitor for the Respondents: *Parsons.*

J. C.* 1871 Jan. 23, 25, 26.

HENRY THURBURN AND ANOTHER . . . APPELLANTS;
AND
ROBERT STEWARD AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

4 P.C. 341

Cape of Good Hope, law of—Placaat of Charles V., 4th of October, 1540—Conflict of Laws—Domicile—Marriage Settlement made in England, affecting real estate in the Cape Colony — Bond of Hypothecation—Registration—Bankruptcy—Distribution of assets—Order of priority of Creditors on separate and joint estate of Bankrupt—Postponement of Wife's claim under Settlement to Creditors—Insolvency Ordinance, No. 6 of 1843—Undue preference.

The 6th section of the *Placaat* of the Emperor *Charles* V., of the 4th October, 1540, postponing the claims of Wives, under Marriage Settlements, until the claims of Creditors of the Husband are satisfied, formed part of the Roman-Dutch Law, which was introduced by the Dutch Colonists on the settlement of the *Cape of Good Hope* in the year 1650, and is still in force in the Colony, unaffected by the Colonial Insolvent Ordinance, No. 6, of 1843.

P., a Merchant domiciled in *England*, a member of a Firm in the *Cape of Good Hope*, executed in *England* a settlement on his marriage with an English woman, whereby he covenanted to pay the Trustees of the Settlement the sum of £13,000 for his Wife's benefit, and to secure the same by a mortgage on his real estate in that Colony. At the time of the Settlement *P.* was perfectly solvent. The Settlement was not registered in the Colony. *P.* afterwards went to the *Cape*, and by a Bond hypothecated his real estate there to his Wife to secure the sum of £13,000 in satisfaction of the Settlement. This Bond was registered in the Colony. *P.* also, while there, remitted a sum of £7,000 to the Trustees on account of the sum of £13,000 secured by the

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* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), and SIR JOSEPH NAPIER, BART.

Settlement. *P.'s* Firm at the *Cape* was some time afterwards adjudicated, in that Colony, Bankrupts, and *P.* was also made a Bankrupt in respect to his separate estate:—*Held*, first, that as the 6th section of the *Placaat* of *Charles* V. was part of the law in force in the *Cape of Good Hope*, it postponed the claim of *P.'s* Wife under the Settlement until his Creditors were paid.

Second, that although the Settlement was made in *England*, the domicile of *P.* and his Wife, yet that the *Placaat*, being a rule governing the distribution of the assets of the Bankrupt, prevailed in the Colony, as the provisions of the 6th section did not limit it to Marriage Settlements by Dutch Law, so as to exempt Settlements by English Law. The rule being that in a distribution of assets in a *concursus* of Creditors, the order of distribution is a matter for the *lex fori* where the distribution takes place.

Held, further, that under sects. 34 and 36 of the *Cape* Insolvency Ordinance, No. 6, of 1843, the provisions of sect. 6 of the *Placaat* did not apply so as to postpone the claim of the Wife of *P.* to the Creditors of the joint estate of the Firm, but only to the separate estate of *P.*

The Court below—in a claim for reconvention by the Assignees of *P.* against the Trustees of the Settlement—held that the payment of the £7,000 was an undue preference in contemplation of Bankruptcy, within the meaning of the 84th section of the *Cape* Insolvent Ordinance of 1843. On appeal such holding reversed.

As a general rule the appellate Court will not reverse a decision of the Court below on a mere question of fact; but where there is no conflict of testimony, and the only question of fact is as to the effect of the facts proved in raising further inferences of fact, that rule does not apply.

THE Appellant, *Paterson*, a native of *Scotland*, resided in the *Cape Colony* from the years 1842 to 1859. In the latter year he removed to *London*, where he acquired an English domicile. In the year 1863 the Appellant married *Marizza Bowie*, his second and present Wife, in *England*. On the day before such marriage, and in contemplation thereof, a Settlement or Marriage contract was executed, of which the Appellant himself, with two other persons since deceased, were constituted Trustees. The Appellants were the surviving Trustees of such Settlement.

At the time of the Settlement and marriage, the Appellant, *Paterson*, was a partner in the mercantile firm of *Paterson, Kemp, & Co.*, at *Port Elizabeth*, in the *Cape Colony*, the only other partner of which was a Mr. *Vardy*, who lived at *Port Elizabeth*, and managed the business of the firm there.

By the aforesaid Settlement the Appellant, *Paterson*, covenanted to pay his Wife an annuity of £1,200 in case of her surviving him, and to pay the Trustees £10,000 for the children of the marriage; and he covenanted to give the Trustees a Mortgage Bond over

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certain specified property in the *Cape Colony*, to secure the payment of the annuity and of £5,000 on account of the £10,000, but so that he should be entitled to demand a release of such Mortgage security on paying to the Trustees £13,000, as a sufficient sum to meet the obligation for payment of the annuity, and the sum of £5,000 on account of the children's provisions. By the same Settlement the foregoing provisions were declared to be in discharge of all legal claims by *Marizza Bowie* or the children of the marriage, and *Marizza Bowie* made over to the Appellant, *Paterson*, all her estate, real and personal, present and future. *Marizza Bowie* had not any fortune or marriage-portion, nor had she afterwards through gift or succession from any friends or relatives. This Deed of Settlement was not registered in the Colony.

The Appellant paid a visit to the *Cape Colony* in the course of the year 1863, and while at *Cape Town* handed to his Conveyancer a copy of the above Settlement, requesting him to prepare such a Mortgage Bond as was required by it. The Conveyancer prepared a Mortgage Bond or Deed of hypothecation from the Appellant to his Wife (a usual mode of conveyancing in the Colony), and the same was executed and registered at *Cape Town* on the 20th of August, 1863, which purported to hypothecate the property specified in the Settlement, for the sum of £13,000, in accordance with the conditions of such Settlement, a copy of which Deed was filed with the Deed in the Office of Registry.

In the latter part of the year 1865 the Appellant, *Paterson*, went to the Colony, and finding that, although his means were much reduced by the failure of many of the Debtors to his firm, he still had a surplus of assets, he made an arrangement with the *Standard* and *London* and *South African Banks*, who were the principal Creditors of the firm, by which he gave them further security, and they undertook to liquidate both the partnership and his private estates.

The Appellant, *Paterson's*, co-trustees of the Settlement, who had adopted the Deed of hypothecation of the 20th of August, 1863, refused to release that Mortgage without full payment of the £13,000, whereupon the Appellant remitted from the Colony to his co-trustees in *England* the sum of £4,000 in February, 1866, and three Bonds of the nominal value of £3,300 in April, 1866,

making in all £7,300, which the Trustees of the Settlement received on account of the £13,000 on the trusts of the Settlement.

The Appellant, *Paterson*, informed the *Standard* and *London* and *South African Banks* of these remittances before the arrangement with those Banks hereinbefore referred to was made; but after the making of that arrangement the Manager of the *Standard Bank* told the Appellant that he had heard there was a law in force in the Colony which made the Marriage Settlement void, and that he must get back the £7,000.

The Appellant, *Paterson*, returned to *England* in August, 1866, and the Banks put both his private and the partnership estates under sequestration, the former on the ground that he had left the Colony. The Respondents were the Trustees of the private estate of the Appellant, *Paterson*, under the sequestration.

On the 11th of December, 1867, the Appellant, *Thurburn*, with a co-trustee of the Settlement since deceased, proved a debt of £17,000 against the Appellant, *Paterson's*, private estate, as the balance due to them under the Settlement, the same being secured to the extent of £13,000 by the Deed of hypothecation; but on the 22nd of May, 1868, the Supreme Court at *Cape Town*, on the application of the Respondents, ordered that the above proof should be expunged, and that the Trustees of the Settlement should have liberty to declare against the Trustees of the insolvent estate, in order to determine the validity and amount of their debt.

Accordingly, on the 4th of November, 1868, the Appellants, as Trustees of the Marriage Settlement, filed their declaration in the present suit against the Respondents, as Trustees of the separate insolvent estate of the Appellant, *Paterson*, and thereby, after stating the Settlement and Deed of hypothecation, submitted to the Court that, although the latter hypothecated the property therein mentioned for a less sum than it should have been hypothecated for, inasmuch as it hypothecated the same for only the estimated value of the annuity of £1,200, and not for any part of the sum of £10,000; and although it was informal, in purporting to make the Wife the Mortgagee instead of the Trustees, yet that, in substance and effect, it was an instrument of the same force as if it had been directly executed in favour of the Trustees for securing the

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sum of £13,000 towards the purposes of the Settlement. The declaration proceeded to state the payment of the £7,000 to the Trustees, the sequestration of the respective estates of *Paterson, Kemp, & Co.*, and of the Appellant, *Paterson*, the proof of debt made by the Appellants, and the Order expunging the same, and the belief of the Appellants that the separate estate of the Appellant, *Paterson*, would ultimately prove sufficient to pay the Appellants and all the other Creditors in full, and leave a surplus to be divided among the Creditors of *Paterson, Kemp, & Co.;* and the Appellants prayed, that their proof of debt might be restored, and that they might be declared to be preferential Creditors by virtue of the Deed of hypothecation for £13,000, part of the £17,000, and concurrent Creditors for the residue; or otherwise that *Marizza Paterson* might be declared to be at liberty, as a Trustee for the Appellants in their capacity as Trustees of the Settlement, to prove in preference on the Deed of hypothecation for £13,000, and the Appellants to prove as concurrent Creditors for £4,000.

The Respondents pleaded the general issue; that *Marizza Bowie*, on her marriage with the Appellant, *Paterson*, brought no portion, nor was anything brought into settlement on her account, and that, therefore, any settlement made by him for the benefit of his Wife and children was null and void so far as the same came into competition with his *bonâ fide* Creditors; that the Deed of hypothecation was made by the Appellant, *Paterson*, by way of free gift to his Wife, and was, therefore, absolutely null and void; that the Marriage Settlement was never registered in the Colony; that the Appellant, *Paterson*, had paid the Trustees of the Settlement £7,300, which ought to be taken in satisfaction *pro tanto* at once of the sum of £13,000 mentioned in the Settlement, and of the annuity of £1,200, and the sum of £5,000 provided by the Settlement to be secured, so as to leave only 57/130th parts of the annuity and sum of £5,000 still due; and that the Deed of hypothecation had never been ceded to the Appellants, who were not the legal Owners or holders thereof.

Of these pleas, that which was founded on the allegation that the Wife brought no portion, and that nothing was brought into settlement on her side, raised the question of the force and effect

of the Edict or *Placaat* of Charles V., of 1540, in the Colony (1); and the plea, which was founded on the allegation that the Settlement was never registered in the Colony, proceeded on an Ordinance or Proclamation issued by the Dutch Government in 1805, which in certain cases and for certain purposes requires the Registration of Marriage Contracts.

The Respondents, also, in a claim in reconvention, alleged that the Appellant, *Paterson*, had remitted and the Trustees of the Settlement had received £7,300 through a collusive arrangement, mutual understanding, and common consent between them and him, the latter to give and the former to get an undue preference over the other Creditors of the Appellant, *Paterson*: and the Respondents prayed, that the Appellants might be declared to have forfeited the £7,300 in regard to the insolvent estate, and might be ordered to refund that amount to the Respondents, and might be excluded from proof on the estate in regard thereto. The claim in reconvention was based on the 84th (2) and 88th sections (3) of the Ordinance No. 6 of 1843, which is the law governing insolvencies in the *Cape Colony*.

(1) The following is a translation from the *Groot Placaat Bock, Deel.* I. pp. 313, 318, of the 6th section of the *Placaat* of the Emperor *Charles* V., dated the 4th of October, 1540, which was in question in this case:—

"Further, whereas many Merchants take upon themselves to constitute in favour of their Wives large dowers, and excessive gifts and benefits upon their property, as well in consideration of marriage as to secure their property with their aforesaid Wives and Children, and afterwards are found to become insufficient to pay and content their Creditors, and wish to have their Wives and Widows preferred before all Creditors, to the great injury of the course of commerce: We will and ordain that the aforesaid Wives, who henceforward shall contract marriage with Merchants, shall not be entitled to pretend to have or receive any dower, or any other benefit on the property of their Husbands, or to take part and share in the acquisitions made *stante matrimonio* by the Husbands, even in cases where property has been actually inherited or borrowed for the purpose, until such time as all the Creditors of their aforesaid Husbands shall be paid and satisfied, and whom we will, in respect hereof, to be preferred before the aforesaid Wives and Widows, saving to the latter their right of preference, as the same is competent to them, by reason of their marriage portion brought by them into the marriage, or obtained by them through gift or succession from their friends and relatives."

(2) See the material part of sect. 84, mentioned in their Lordships' judgment, *post*, p. 517.

(3) The 88th section is as follows:—"And be it enacted that, in every case in which any person, whether actually a Creditor or not, shall be obliged, by virtue of the 84th or 85th or 87th

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The Appellants filed a general replication.

The hearing took place on the 9th, 11th, and 12th of February, 1869, before the Chief Justice *Bell*, and the Justices *Denyssen* and *Dwyer*. The Court reserved judgment, and on the 12th of March, 1869, the majority of the Court, consisting of the Chief Justice and Mr. Justice *Denyssen*, gave judgment in favour of the Respondents, and declared that the sixth section of the *Placaat* of *Charles* V. was a subsisting operative law within the Colony. Mr. Justice *Dwyer* differed in opinion from them, and was in favour of the Appellant on all the points raised by the pleadings.

The Judges transmitted the following reasons for their judgments:—

The Chief Justice, after stating the facts of the case, proceeded as follows: "The first question submitted to the Court for judgment was, whether these Trustees of an English Settlement, which has never been registered in the Colony, had a preferent claim upon the estate of *Paterson* for the moneys covered by the Settlement. It was at first argued, that the Settlement had, in fact, been registered by virtue of the reference to it in the Deed of hypothecation and its annexation to that Deed, both being thus in fact upon the Record, as was argued, and, therefore, that the Plaintiffs had a hypothec for satisfaction of the provisions of the Settlement; but the ground of registration was ultimately abandoned, and need not further be considered, and thus the question of any preferent right by virtue of the Settlement standing by itself as a registered document was disposed of against the Plaintiffs. Much anxious argument was addressed to the Court as to the rights which the *status* of marriage gives, as to the law of domicile, and as to the law of the place of contract, with the view of shewing that the rights of the parties in the present case were to be regulated by the law of *England*, where the marriage took place, where *Paterson* was said

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sections of this Ordinance, to restore or repay, as the case may be, for the benefit of the insolvent estate, any alienation, transfer, cession, delivery, mortgage, or pledge, or any payment as having been an undue preference, such person shall not be allowed to claim or prove as a debt the amount of what he shall have so restored or repaid, but shall wholly forfeit such amount as regards the insolvent estate, in case such undue preference was received by such person by or through any collusive arrangement, mutual understanding, or common consent between such person and the Insolvent, the one to give and the other to get such undue preference."

to have been domiciled, and where the Marriage Settlement was said to have been framed and executed; but in the view I take of the case, it is not necessary to consider any of these matters. It may be conceded that the *status* of marriage will give to the spouses, so far as regards them individually, the same rights all the world over; but with this qualification, that the rights claimed do not conflict with the rights of third parties according to the positive law of the Country in which the claim is asserted. It may be conceded that *Paterson's* domicile was in *England*, and that he was entitled to make such a Settlement upon his Wife and children as the law of *England* would sanction, and that that law would have sanctioned this particular Settlement; but the concession must be with this qualification, that the Settlement does not conflict with the positive law of this Colony, where the claims under the Settlement are asserted. It may also be further conceded that, *England* being the place where the contract was executed, the law of *England* should determine the rights of the parties to it, but that concession also must be with the qualification that the rights do not conflict with the positive law of this Colony. The argument upon these different heads was sound in principle, but erroneous in application. If the question for the Court to decide had been in regard to the relative rights of Mr. and Mrs. *Paterson* under the Settlement and those who, with them, took their rights under and by virtue of the Settlement, the argument for the Plaintiffs might have been sound. It is to questions of this kind that the authorities referred to by the Plaintiffs apply, especially §§ 276 and 276 (a) of *Story's* Conflict of Laws, and the case of *Anstruther* v. *Adair* (1) there referred to. The question for the decision of the Court, however, is of a totally different nature. It is in regard to the right of the Plaintiffs, as representing Mr. and Mrs. *Paterson* and their Children under the trusts of the Settlement, in competition with the Creditors of *Paterson*, who claim independently of, and in opposition to, the Settlement, and under the positive law of the Colony. It would take too much time and space to go through all the commentaries upon this subject; but, in my opinion, what *Story*, in § 325 (h) states to be the result of the doctrine of *Rodenburg*, seems to me, to be the result of all the best authorities on

(1) 2 My. & K. 513.

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the subject, and that is, that the proper *forum* to decide questions of priorities and preferences of Creditors is the place of the domicile of the Debtor—that the law of that place, and not the law of the place of the contract, is to govern in all such cases, in respect to moveables situated in the place of the domicile; but as to moveables situated elsewhere, as well as to immoveables, the *lex rei sitæ* is to govern. The latter part of this doctrine is in fact recognised by Lord *Ellenborough* in *Potter* v. *Brown* (1), and is more distinctly recognised by *Kent* in his Commentaries, where he says, that when the *lex loci contractus* and the *lex fori* come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est ut jus nostrum quam jus alienum servemus;* and *Burge*, in his Commentaries, states the matter thus:—'No State is bound to admit a Foreign law, even for the purpose of a contract receiving effect, when that law would contravene its own positive laws, institutions, or policy, or when it would prejudice the rights of its own subjects.' In my opinion, therefore, the law of this Colony, where both moveables and immoveables are situated, is to decide how far the rights of third parties are to be affected by this English Settlement. The *Placaat* of *Charles* V., of the 4th of October, 1540, says, in its 6th section:—[The Chief Justice read the section, *ante*, p. 483, note (1), and proceeded:—] That *Placaat*, it was argued, was obsolete, and inconsistent with the progress which society had made in such matters; but *Van der Keessel* (*Theses*, 258) refers to the *Placaat* as an authority for stating that the *morgen-gave* is not acquired until after Creditors have been paid, although according to its nature it ought to be given on the first day after marriage, thereby clearly recognising the *Placaat* as existing law; and in *The Trustees of South African Bank* v. *Chiappini* (2), decided in this Court in 1856, the *Placaat* was recognised as subsisting law within the Colony, so that, even if I concurred in the description of the *Placaat* given from the Bar, I should not feel at liberty to disregard it; but, in my opinion, it is a law founded on sound wholesome principle, well suited to a commercial community such as this, which ought to receive full effect, and no better illustration of that could be given than the present case. It seems that *Paterson*, after being not much longer than ten years in

(1) 5 East, 124. (2) 2 Buchanan's Cape of Good Hope Reps. 143.

business, had in some unaccountable way realized a fortune so large as £120,000, yielding him, independently of his continuing business, an income of £7,000 a year. As to his solvency, therefore, at the time he entered into his marriage settlement, there can be no question, if that were in question, as it is not. Not content with such an ample fortune made out of nothing, his appetite for money growing with the increase of that it fed on, he resolved to continue the course of speculation by which he had realized so ample a fortune, taking the precaution, however, previously, to secure out of that fortune ample provisions for his new Wife and possible new family, to secure them from the hazard to which he was about to expose the remainder of his fortune, and with it the money of other persons, with whom he contemplated prosecuting his speculations—not, however, be it observed, by withdrawing from his own coffers, and vesting in Trustees the funds to constitute these provisions, but by giving a mere covenant to make the provisions. Giving effect to this *Placaat* of 1540, the result, in my opinion, is, that the Trustees of this Settlement are not entitled, by virtue of the Settlement standing alone, to be ranked upon the estate of *Paterson*, either preferently or concurrently, for any part of the value of the Widow's annuity until after all the Creditors of *Paterson* shall have been paid their debts in full. In other words, the rights of the Trustees under the Marriage Settlement must be postponed till all the Creditors of *Paterson* have been paid their debts in full. The next question for consideration must be said to be twofold: first, whether the Plaintiffs have a preferent right by virtue of the Deed of hypothecation; and, secondly, whether, if the form of that Deed should prevent this being done directly, it may not be done by the singular process of converting Mrs. *Paterson*, in whose favour the Deed of hypothecation is made, and who is one of the *cestuis que trust* of the Settlement, into a Trustee for the Trustees of that Settlement. In truth, the first of these questions is so far disposed of, by what I have already said as to the effect of the *Placaat;* for I apprehend that, even if the Deed of hypothecation had been what it is not—a valid, effectual Deed in itself—it could not stand in the way of the Creditors of *Paterson;* but any right which it might have given, whether to Mrs. *Paterson* or to the

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Trustees of the Settlement for Mrs. *Paterson*, must, in obedience to the *Placaat*, have been postponed to the rights of *Paterson's* Creditors; but I may observe—though the observation will not affect the result—that if the Deed of hypothecation had been a valid instrument, creating a hypothec on the real property of *Paterson*, it might have been arguable that that hypothec would be, or ought to be, made available to the children of the marriage to the extent of five-thirteenths of the amount which it was intended to secure—namely, £13,000; for although the declaration alleges, that the Deed of hypothecation was 'for only the estimated value of the life annuity, and not for any part of the £10,000' settled upon the children; and although the Deed of hypothecation states that it is given 'for the sum of £13,000, which the Appearer acknowledges himself to be indebted to the said *Marizza Bowie*;' yet, by the Marriage Settlement, £13,000 was the sum for which *Paterson* was to give security for the payment of the life annuity to the Widow, and of one-half of the £10,000 provided for the children, and upon the payment of which, or a deposit of it in the *Bank of England*, *Paterson* was to be entitled to ask for a cancellation of the hypothecation. I understand, therefore, if that Deed of hypothecation could be dealt with as a valid instrument, effectual to create an hypothecation, that on a proper application for the purpose, and with the proper parties before the Court, the rights under it would be separable in the proportion of eight-thirteenths, or £8,000, as the value of the life annuity, and of five-thirteenths, or £5,000, the half of the £10,000 provided for the children. But it is not necessary to follow this further; because, in my opinion, the Deed of hypothecation is an entire nullity, and could receive no effect even if the *Placaat* of 1540 did not stand in the way of the Plaintiffs. At the time that this Deed of hypothecation was executed, the Grantor and the Grantee stood in relation to each other as Husband and Wife. It was not possible, therefore, for *Paterson*, the Husband, to give this hypothecation to his Wife, which cannot be regarded in any other light than as a *donatio inter virum et uxorem*. It is given to the Wife 'for the sum of £13,000, which the appearer acknowledges himself to be indebted to the said *Marizza Bowie*,' but there is no evidence whatever that he was

indebted to his Wife in such sum or any other sum, if the truth of that statement would have saved the Deed from the challenge of nullity, nor can it be said to have been given in satisfaction of a covenant made antecedently to marriage. There is, no doubt, a reference in the Deed to the Marriage Settlement, and to 'certain provisions and payments therein referred to, to be secured to the said *Marizza Bowie*,' but on reference to the Settlement there are no provisions or payments to be secured to the Wife; the security is to be the Trustees of the Settlement, not of £13,000 to be held for Mrs. *Paterson*, but of £13,000 as the estimated value of the life annuity to the Widow, and of £5,000, the ascertained amount of half the provision of £10,000 to the children. The declaration prays, that the Trustees may be declared preferent Creditors upon the estate of *Paterson* by virtue of this Deed of hypothecation, but it is obviously impossible that this prayer can be granted in the absence of Mrs. *Paterson*, who, *ex figura verborum*, is the Creditor in the Deed. It cannot even be said, that the Deed is substantially the performance of the covenant of *Paterson* with the Trustees in the Marriage Settlement. In an action by the Trustees against *Paterson* for performance of that covenant this Deed could form no answer to the action; it is not even in the terms of the covenant as to what it obliges *Paterson* to perform, nor does it contain mention even of the Trustees in whose favour the covenant was conceived. Undoubtedly there are expressions in the Deed of hypothecation which connect it with the Marriage Settlement, and suggest the notion that in granting the hypothecation *Paterson* might have had the idea that he was performing the covenant in the Marriage Settlement which bound him to give a mortgage for the said annuity of £1,200 and provision of £10,000, to the extent of £5,000, in favour of the Trustees of the Settlement, though it is difficult to conceive how he could have formed the idea that he was doing so by giving to his Wife a security for payment to her of the entire sum of £13,000 as owing to her under the Settlement. If the *Placaat* of 1540 had not postponed the right of the Trustees to those of the Creditors of *Paterson*, it might perhaps have been necessary to have allowed the Trustees an opportunity of putting themselves in a position to claim the benefit of this Deed of hypothecation, and

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it may at a future time be necessary to do so, should *Paterson's* Creditors be paid in full, as we were told was likely to be the case; for I cannot doubt that if a proper application were before the Court for that purpose, it would find its way to making the Deed of hypothecation what it ought to have been, and, possibly, was intended to be—viz., a Deed by *Paterson* in favour of the Trustees of the Settlement. It will be the duty of the Court, however, to direct such an intimation to be given to the Keeper of the Register as will prevent *Paterson*, through the agency of his Wife, dealing with the hypothecation in such a way as to defeat the interests of the Trustees of the Settlement, should it, on the final winding-up of *Paterson's* estate, be found to be of any value. The provision of £10,000 for the children, made by the Marriage Settlement, stands in a different position from the provision of an annuity for the Widow. Provisions to children are not struck at by the *Placaat*—at least, in such terms as would, in my opinion, warrant the Court in giving this effect to it. No doubt, in the preamble of the section the mischief to be remedied is stated to be that Merchants make 'excessive gifts and benefits upon their property, as well in consideration of marriage as to secure their property with their aforesaid Wives and children;' but, in the language providing remedy for the evil, the word 'children' is dropped, and 'Wives and Widows' are the only persons who are denied the benefit of the excessive gifts of the Husband. Possibly the Legislature may have intended to prevent excessive gifts to children as well as to Widows, but the language used has not done so. With regard to the remittances of £4,000 and £3,000 made by *Paterson* from *Port Elizabeth* to the Plaintiffs, the Trustees of the Settlement, the facts of the case establish conclusively that they were an illegal preference of them over the other Creditors of *Paterson*. The advances were made at a time when *Paterson's* circumstances were such as made sequestration of his estate imminent, and necessarily in his contemplation, according to the decisions of this Court, and with the intention not only of securing payment to the Trustees of £7,000, but as an inducement to them to enable him to make them a further payment of £6,000 as the proceeds of the sale to *Joseph*. These payments are struck at by the first branch of the 84th section of the

Insolvent Ordinance, No. 6 of 1843, mentioned; and, therefore, in terms of the section, they must be 'declared to be null and void,' which is all that the section says. It was strongly argued for the Defendants that this remittance by *Paterson,* who was both Debtor and Creditor, was to be taken to have been made through a 'collusive arrangement, mutual understanding, or common consent' between Creditor and Insolvent in the 88th section of the *Insolvent Ordinance* mentioned, and, therefore, that, under the provisions of that section, the Plaintiffs should be declared to have wholly forfeited the £7,000; but the 88th section only gives this forfeiture in every case in which a person shall, by virtue of the 84th section, be obliged to repay, for the benefit of the insolvent estate, any payment, as having been an undue preference, whereas the 84th section merely declares that the payment shall be null and void, without saying more. I cannot say that, considering the highly penal character of the 88th section, I feel at liberty to visit upon the Trustees of the Settlement, and through them upon the children of the marriage, the effect which it would give to *Paterson's* act. I think it is only fair to look upon *Paterson,* when making this remittance, as in his individual capacity, and not as a Trustee, but, on the contrary, as opposed to the Trustees. If this be done, there is no evidence that his co-Trustee had any 'collusive arrangement, mutual understanding, or common consent' with him. The evidence goes no further than that he refused to release the hypothecation, unless on payment of the full £13,000. There is no evidence that he knew where the £4,000, or the £3,000, came from. My opinion then is, that the effect of the *Placaat* of 1540 is to postpone the claims of the Trustees on behalf of Mrs. *Paterson* till all the Creditors of *Paterson* shall have been paid; that the Deed of hypothecation is a nullity in itself; and on that ground, independently of the *Placaat,* cannot give any right to the Plaintiffs, the Trustees of the Settlement, to claim upon *Paterson's* estate; that the Trustees, on behalf of the children of the marriage, are entitled to rank as concurrent Creditors upon *Paterson's* estate for some part of the £10,000; that the remittance of £7,000, by *Paterson* to the Trustees was done in contemplation of sequestration, and with an intention to prefer the Trustees before his other Creditors, and, therefore, in terms of the 84th section of the *Insolvent Ordinance,* should be declared to be an undue preference,

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and to be null and void; that this remittance was made by *Paterson* in discharge, *pro tanto*, of the £13,000 secured to Mrs. *Paterson* by the Deed of hypothecation, and that that £13,000 was, in truth, the estimated value of the Widow's life annuity, together with £5,000, the half of the £10,000 provided for children; that the amount of the ranking of the Trustees in respect to the £10,000 must depend upon what is to be done in regard to this £7,000, as to which parties ought to be heard.

Mr. *Justice Denyssen* stated his reasons as follows:—"First, with reference to the Deed of hypothecation of the 20th of August, 1863, it appears to me the Court cannot avoid declaring it null and void. In it, *Paterson* declared himself indebted to his Wife in the sum of £13,000, for the security of which he specially hypothecates part of his property in *Port Elizabeth*. True, in the Bond reference is made to the Marriage Settlement of January, 1863, but by that Deed a Bond was to have been passed in favour of the Trustees, which is not the Bond in question, and the execution of which Bond, notwithstanding the Bond of August, 1863, the Trustees had at any time thereafter a right to demand. Nothing indeed appears upon the Bond in question as now upon the record to shew that the Trustees under the Settlement had acquired any right or title to the same, and the Bond cannot be considered, therefore, in any other view, in my opinion, than, as conferring upon the Wife, pending marriage, a gift which cannot be supported in law. But supposing this Bond to have been passed in favour of the Trustees under the Settlement for the purpose of securing the annuity of the Wife, is the preference now claimed to be conceded to it, to the prejudice of the Creditors under the insolvency in this country? Every hypothecation or privilege upon property is a real right, and its existence, validity, or priority depends upon the laws of the *situs* of the property so hypothecated; indeed, in all questions regarding an interest in immoveable property, the *lex loci rei sitæ* must prevail. (*Voet, Lib.* II., Tit. iv, *pars secunda*, ss. 3 and 12; also *Lib.* XX, Tit. 4, s. 38; *Burges'* Comms. on Col. and For. Law, Vol. II., p. 841; *Story*, Confl. of Laws, sect. 325, h.) The language of Marriage Settlements must be interpreted, says *Story*, according to the law of the place where they are contracted (Sect. 276.) And in sect. 323, referring to a judgment of Chief Justice *Marshall*: 'The law of

the place where a contract is made, is, generally speaking, the law of the contract—*i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is intrinsic, and rather a personal privilege, dependent on the place where the property lies, and where the Court sits which is to decide the cause.' *Story* refers to *Huber* and *Hertius* as adopting the same doctrine; also to *Rodenburg*, who, he says, has discussed at large the subject in relation to the privileges and the priorities of Creditors in cases of insolvency where property moveable or immoveable is situated in different countries, and is not sufficient to pay all debts, and lays down the doctrine as to immoveables, that the law *rei sitæ* must govern. *Paul Voet* expressed the same doctrine—'*Immobilia reguntur locorum statutis, ubi sita; etiam quoad ea, si de æstimandâ hypothecâ, aut de privilegiis inter hypothecarios agatur, non inspiciendus erit locus domicilii vel debitoris, vel creditoris, verum locus statuti ubi jacent.*' The laws of this Colony having, therefore, to determine upon the preference claimed in case the Bond had been passed in favour of the Trustees for the security of the Wife's annuity, it is clear by the decision of the Court in *The Trustees of the South African Bank* v. *Chiappini*, that no such claim can be entertained. That judgment is founded upon the *Placaat* of *Charles* V. Whether it is bad or good law, it is not for this Court to determine; it is acknowledged by all the authorities on Roman-Dutch Law, and in the *Regtsgeleerde* Observations on *Grotius*, it is declared as having removed doubts which formerly existed on the subject. According to that *Placaat*, and in terms of the judgment above cited, this claim can only be entertained, therefore, after all the Creditors in the insolvent estate of *Paterson* have been satisfied. This virtually disposes of the prayer in the declaration as far as the Bond is concerned; but there remains the question as regards the claim of the Children under the Marriage Settlement. The Bond being null and void, the claim of the Children cannot be founded upon it. And, inasmuch as the Marriage Settlement has not been registered in this Colony, no preference can be awarded upon it in that respect, nor do the Plaintiffs make any such claim; but there is nothing, in my opinion, to prevent this claim being ranked under the insolvent estate in concurrence with other Creditors. The only other question refers to the payment of £7,000 by *Paterson* to the

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Trustees under the Marriage Settlement, as Creditors of his estate, at a time when *Paterson* well knew he was in embarrassed circumstances. This point has been raised upon the claim in reconvention by the Trustees of the insolvent estate, and, upon the principles laid down by this Court in a number of cases, I can arrive at no other judgment than that the payment was so made, and, therefore, null and void under the provision of the 84th section of the Ordinance No. 6, 1843. The 88th section does not apply, in my opinion, as there is no evidence to prove any collusive arrangement, mutual understanding, or common consent. How to recover the £7,000 is not for the Court to point out, nor do I think it necessary now to enter into any calculation as to how much of the £7,000 must be computed as representing the £5,000 to be secured to the children, and how much thereof the annuity of the Wife. In my judgment, the Bond of the 20th of August, 1863, must be declared null and void, the Plaintiffs' claim upon it dismissed, the claim of the children under the Marriage Settlement admitted as a concurrent debt under the insolvent estate—the amount to be hereafter ascertained—and any amount which may be found upon calculation to represent the annuity of the Wife to be paid to the Trustees after the payment of all debts under the insolvent estate of *Paterson;* and finally, that the payment of £7,000 by *Paterson* to the Trustees under the Marriage Settlement be declared an undue preference, and, under the provisions of the 84th section of the Insolvent Ordinance, null and void."

Mr. Justice *Dwyer* stated his opinion as follows:—"An important decision on the law of domicile and the *lex loci contractus* will be found in the case of *Pappe* v. *Home* (1), and does not admit of there being any doubt upon these two points. The Marriage Settlement contains the provision in lieu of dower usual in English Settlements, and declares 'that such provision shall be accepted as in full of all legal claims which his Wife might have against the Settlor or his estate in any manner of way.' These words construed according to the *lex loci contractus* (*i. e., England*), as well as to the law of this Colony, would deprive the Wife of any right to a community of goods with her Husband, and the marriage, therefore, was a marriage out of community—a point, as it appears to me, of very great importance when we come to consider the

(1) 1 Menzies' Cape of Good Hope Reps. 212.

validity of the deed of hypothecation. It has been very properly conceded by the learned Counsel for the Defendants that this ante-nuptial contract would be valid in *England* against the Creditors of *Paterson*, and that it would be equally valid here but for the *Placaat* of 1540; subject, however, to the objections as to the form of hypothecation and the want of registration; therefore, the question of domicile has, in fact, nothing to do with the case. As to the *Placaat* of 1540, I am of opinion, that it never was more than declaratory of the then existing law in *Holland*, and applied only to settlements made by traders in a state of insolvency. The different sections of the *Placaat*, when read together, seem to lead to this conclusion; and in the passages from *Grotius*, cited by the learned Counsel for the Plaintiffs, the commentator says that "Insolvents may not make ante-nuptial contracts to the prejudice of their Creditors," and that "the point is so settled by the *Placaat* of 1540." It is quite clear from the words of this learned Author that his view of the then law was, that the *Placaat* referred to persons insolvent at the date of the settlement, and not to subsequent insolvency. The law in *Holland* was then, as it is now here, as it also is in *England*, that a person in insolvent circumstances could not make a settlement on his Wife and the children of the marriage by ante-nuptial, and, *à fortiori*, by post-nuptial settlement, which would have the effect of defeating existing Creditors—a law founded upon the simple principle of justice that the property is already tacitly pledged to such Creditors, and that to give such a contract a preference would be to defeat and invalidate such pledge. The preamble also of the *Placaat* seems to lead to this interpretation as the correct one; and upon this point I am of opinion that the *Placaat* of 1540 in no way interferes with the validity of the settlement in question. But assuming, for the sake of argument, that the *Placaat* must be interpreted according to the view taken by the rest of the Court, we must then inquire if such *Placaat* is law in this Colony. Until the decision of the two learned Judges of the Supreme Court, who decided the case of *The Trustees of South African Bank* v. *Chiappini* (1), in 1856, the *Placaat* of 1540, although cited by *Grotius*, had never been acted upon or recognised as law in this Colony, nor, as far as we can learn, ever even alluded to in the many cases respecting ante-

(1) 2 Buchanan's Cape of Good Hope Reps. 143.

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nuptial contracts to which it would have been a complete answer, nor is there any evidence that it was law in *Holland* at the time of the surrender of this Colony to *Great Britain* in 1805. The case of *The South African Bank* v. *Chiappini* (1) was essentially different from this; the questions in the former arising upon a marriage in community, a small portion of the properties of the Husband and Wife respectively being excepted from the community by ante-nuptial contract. It does not appear by the report of that case that the *Placaat* of 1540 was ever referred to by the learned Counsel on either side during the argument, and Mr. *Cole*, who was Counsel for the Plaintiffs, has informed me, that this *Placaat* was not mentioned throughout the case; Mr. *Porter*, then Attorney-General, and Sir *C. J. Brand*, being the Counsel for the Defendants. The reference to the *Placaat* in the decision in that case (which seems somewhat extra-judicial) took the whole profession by surprise, and created consternation not only amongst the mercantile community, but amongst all classes, it having been stated that, according to some Commentators, the *Placaat* comprised the ante-nuptial contracts of all parties, whether in trade or not; and *Van der Keessel, Theses*, 262, lays down such proposition most clearly and positively. Nothing more was heard of this *Placaat* until March, 1860, when the case of *Dyason* v. *Ruthven* was tried in this Court before the late Chief Justice (Sir *William Hodges*), Mr. Justice *Bell* (the present Chief Justice), and Justices *Cloete* and *Watermeyer*, the latter two being the Judges who decided *Chiappini's Case*. The question at issue was, whether Merchants might stipulate for interest at the rate of 12 per cent. per annum. The Court was unanimous in deciding that there was no law in this Colony restricting the rate of interest to 6 per cent., notwithstanding the 9th Article of this very *Placaat*. And it was further held, that the *Placaat* of 1540 had become obsolete by non-observance for upwards of two hundred and fifty years. Again, we have the Proclamation of 1805 as to the necessity of registering ante-nuptial contracts, in order to enable those claiming tacit or legal hypothec under them to rank as preferent Creditors in cases of insolvency. But if the *Placaat* affected all ante-nuptial contracts, to require registration of that which was invalid would be an absurdity; and if the *Placaat* as to the ante-nuptial con-

(1) 2 Buchanan's Cape of Good Hope Reps. 143.

tracts of Traders were in existence in the Colony, it is not likely that the Proclamation referred to would be altogether silent respecting it. The Court also, in *The Trustees of South African Bank* v. *Chiappini* (1), commented upon the opinion of the Dutch Jurists that 'the *Placaat* was only declaratory of the then existing law in *Holland*, and that it did not introduce any new system of legislation.' And it is quite clear, that the *Placaat* cannot have a more comprehensive signification in this Colony than it had in *Holland*, assuming it to have been in force there at the period of the cession of this Colony to *Great Britain*. In the absence, therefore, of any decision in the Courts of *Holland* upon this point (and if there had been *Van der Keessel* is not likely to have omitted citing them), and there being nothing even in the text Writers to induce us to place that construction upon the *Placaat* that is contended for by the Defendants, and there being no trace of the *Placaat* of 1540 ever having been recognised in this Colony until the extra-judicial reference to it in *The Trustees of the South African Bank* v. *Chiappini*, I am of opinion, that it must be considered obsolete and of no effect whatever in the Colony; and, further, I would say that, even if it ever were law here, the Insolvent Ordinance of 1843 has absolutely repealed it. That Ordinance was intended to place the administration of insolvent estates under one uniform system, and it repeals 'all laws and customs heretofore in force within this Colony in so far as the same are repugnant to, or inconsistent with, any of the provisions of that Ordinance.' It appears to me, that the *Placaat* of 1540 is inconsistent with the Insolvent Ordinance of 1843, and opposed as well to the policy of recent Legislation, which has been to abolish the absurd distinctions which heretofore existed between traders and non-traders. I am at a loss to conceive how the *Placaat* in question, if void as to usury, respecting which similar provisions have been in force in *England* up to a very recent period, can yet be held to be law with respect to ante-nuptial contracts. I cannot believe that it was ever the intention of the Dutch Government to enact a law which appears to me calculated to have the most prejudicial effects upon trade, to prevent men of capital entering into it, and to leave the field of enterprise open only to adventurers who had nothing to lose; and

(1) 2 Buchanan's Cape of Good Hope Reps. 143.

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in the case of *Smith* v. *Norden* (1) it is very remarkable that the *Placaat* of 1540 was not referred to. It is not probable that its existence, if law in this Colony, could have escaped so learned and acute a Judge, and one so profoundly familiar with the Roman-Dutch law, of which his able volume of reports and Commentaries is so valuable an exponent. With respect to the form in which the Mortgage or Hypothecation is drawn, a direct hypothecation by the Husband to the Wife seems somewhat irregular; but it appears not to be an unusual system of conveyancing in this Colony, where the intervention of Trustees (except by means of Trust Companies, and then generally in cases of last Wills) is not often resorted to. Mr. *Paterson* left the draft Settlement with a very eminent Conveyancer, and instructed him to do what was requisite; and he prepared the conventional hypothecation in its present form, which recites that it was made in pursuance of the covenant in the Settlement, and hypothecates the very property covenanted to be settled. In *The Trustees of South African Bank* v. *Chiappini* (2), and in *Smith* v. *Norden* (1), the hypothecations were made direct to the Wife, and if we consider the frequent migrations and other changes that take place in this Colony, as well as the great difficulties of communication with persons who reside even at short distances apart, it is not surprising that a practice should have grown up of doing without Trustees as much as possible; and the same reasons have given rise to the very useful institution of Trust Companies. There can be no doubt that this hypothecation was made to the Wife upon the trusts of the settlement; it is so stated in the declaration and not denied by the pleas, and it has been conceded by the learned Counsel for the Defendants that we could rectify any irregularity by declaring such trusts, and compelling a cession or assignment of the hypothecation to the Trustees of the Settlement. At an earlier part of the case, the Defendants prayed to be absolved from the instance, but upon looking at the form of the Order made by this Court, directing that these questions should be raised by an action brought in the names of the Trustees, which Order was made in the presence and at the instance of the Defendants, I gave my opinion, that the objection came too late,

(1) 1 Menzies' Cape of Good Hope Reps. 167.
(2) 2 Buchanan's Cape of Good Hope Reps. 143.

and that Mrs. *Bowie* being on the face of the Record a Trustee of the mortgaged property, we could do, and were bound to do, substantial justice by deciding the case upon its merits, all parties being before the Court. It has been attempted to be sustained that the fact of the Settlor being one of the Trustees to the Settlement is a proof of fraud; and although the point has not been raised upon the pleadings, the question was argued at considerable length; but I never knew a case in which such a defence so signally failed. It has not been in the slightest degree supported by the parol evidence, or by any inference which we could draw from the documents and facts in the case. It is not likely that Mr. *McRea*, the confidential Solicitor and friend of the Lady's family, and himself one of the Trustees to the settlement, would have made *Paterson* a Trustee merely for the object of defeating the intentions of the parties, and enabling him to misappropriate the trust funds; for which breach of trust *McRea* himself would, perhaps, be made liable. It appears to me that the Settlor was made a party for the purpose of enabling him, then about to visit *Port Elizabeth*, more easily to sell and otherwise manage the trust property for the benefit of all parties interested, who seem to have placed every confidence in him, which is not at all surprising, considering the then state of his affairs; and from the evidence in this case, and the appearance of Mr. *Paterson* in the witness-box, I do not think that confidence was misplaced. I believe, that throughout the whole of this transaction he had acted the part of an honourable man, and there exists not the slightest ground for the imputations of fraud cast upon him, which I think should not have been allowed to be argued, as the point was not raised by the pleadings. There remains the question of registration. A Wife married out of community has a tacit or legal hypothec upon the property of her Husband for such of her property as may be appropriated by him; but in order to render such hypothec valid as against Creditors, it is requisite by the Ordinance of 1805 that the ante-nuptial Contract of marriage out of community should be duly registered, that Creditors might have notice of such tacit hypothec, of which they would be otherwise ignorant, and might give credit to the Husband on the supposition that the property of the Wife would be available for his debts; but in this case, instead of a tacit, we have a con-

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ventional hypothec, duly executed and duly registered; and annexed to it in the Registry we have a copy of the Marriage Settlement referred to in the Deed of hypothecation as notice to Creditors. No registration could be more complete. It was quite unnecessary to register the Settlement. The Mortgage would be valid if made in pursuance of an ante-nuptial parol agreement. The mistake has arisen in consequence of not keeping in mind the provisions and objects of the Proclamation of 1805 respecting registration. Notice of the incumbrance appears in both the Books which have been produced from the Registry Office. I am of opinion, therefore, that upon all the points raised upon the pleadings, our judgment should be for the Plaintiffs, and that they should be allowed to prove and rank as preferent Creditors for the residue of the sum secured by the Deed of hypothecation, credit being given for the amount remitted by *Paterson* to his Trustees, as realized by the sale of a portion of the property hypothecated. The Settlement stipulated for the sum of £13,000, as a security for the annuity, and the Trustees are entitled to that sum irrespective of any estimated value put upon the annuity by a Notary or Actuary. I think the form of our decree should be to declare that the hypothecation to Mrs. *Paterson* was made upon the trusts of the Settlement of April, 1863; that Mr. *Paterson* should be removed from the trusts; that new Trustees should be appointed to act with the other surviving Trustee; that Mrs. *Paterson* should cede the hypothecation to such new Trustees, to be held by them upon the trusts of the Settlement; and that such Trustees should rank as preferent Creditors for the amount now due upon such hypothecation."

The appeal brought was from this judgment (1).

Mr. *J. Brown*, Q.C., and Mr. *Westlake*, for the Appellants:—

First, the rights of the parties in this case depend on the question, whether the 6th section of the *Placaat*, or Edict, of *Charles* V. of the 4th of October, 1540 (2), respecting the liability of a Bankrupt's effects as regards marriage settlements, is, or ever was, received in the *Cape of Good Hope*, or has ever been acted on in that Colony from the time of its settlement as a Dutch Colony in the year 1650.

(1) See case reported *nom. Paterson's Marriage Settlement Trustees* v. *Paterson's Trustees in Insolvency*, 2 Buchanan's Cape of Good Hope Reps. 95.

(2) *Ante*, p. 483.

The majority of the Judges in the Court below were of opinion in the affirmative, but we contend that such a conclusion was erroneous, and that their finding ought to be reversed. That Edict was passed a century before the Dutch settlement in the *Cape*, and from its artificial character, it was neither applicable, nor could it have been intended to have been introduced into what was then an infant Colony. By analogy to the principles of our law, regarding the introduction of the law of England by Settlers in the Colonies, such a law as this, not necessary for the first Settlers, and fraught as it is with great injustice to the Wife, would be held not to have been introduced. The rule is laid down in *Blackstone*, Commentaries, vol. I., p. 107, in these terms:—"Colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of an infant Colony;" and *Blackstone* goes on to say "that the artificial requirements and distinctions incident to the property of a great and commercial people, are neither necessary nor convenient for them, and, therefore, not in force." That rule has been maintained by Jurists as well as Judges; thus in *Chalmers'* Opinions of Eminent Lawyers, Vol. I. pp. 194-7, with respect to the Admiralty jurisdiction; *Ib.*, Vol. II. p. 202, relating to the Statute of Monopolies [Ed. 1814]; upon the question submitted to the Law Officers of the Crown, as to how far the King's subjects, who emigrate, carry with them the Law of England; *Burge's* Comms. on Colonial and Foreign Law, Vol. I. p. xxxii.; *Clark's* Colonial Law, pp. 7, 514; and has also been recognised in a series of cases; thus, as regards Local Acts, as in the nature of Police Acts, *Rex* v. *Vaughan* (1); as regards the *Mortmain Act*, 9 Geo. 2, c. 36, that has been held not to extend to *Grenada: Attorney-General* v. *Stewart* (2); or to *New South Wales: Whicker* v. *Hume* (3). So also the law relating to aliens does not extend to *India: The Mayor of Lyons* v. *The East India Company* (4). As the Respondents affirm that the 6th section of the *Placaat* of 1540 is part of the Roman-Dutch Law introduced in the *Cape*, the burthen is on them to shew that it ever was adopted there. The fact of other sections of the *Placaat* being in force and acted on in the Colony is immaterial, as the *Placaat* is, in reality, a collection of Statutes.

But, secondly, assuming that this particular section of the *Placaat*

(1) 4 Burr. 2500.
(2) 2 Merr. 143.
(3) 7 H. L. C. 124.
(4) 1 Moore's P. C. Cases, 175.

4 Jur N.S. 983.

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was introduced into the *Cape* at the time of the settlement by the Dutch, it has either been abrogated, first, by becoming obsolete by non-user; or, secondly, it is repealed by the *Cape* Insolvent Ordinance, No. 6, of 1843. In the first place, according to Roman-Dutch Law, such an enactment may be abrogated by non-user: *Lord Mackenzie's* Studies in Roman Law, p. 252; *Dig.* Lib. I., tit. 3, p. 32, s. 1; *Van Der Linden*, Institutes of the Law of *Holland*, B. I., ch. III., sec. iii. [Trans. by *Henry*, p. 74], where, treating of marriage contracts, he says, with respect to ante-nuptial contracts, "it is not necessary to be registered judicially, since the *Placaat* on this head, of the 30th of July, 1624, has never been acted upon;" and he refers, in a note, in support of this position to *Regtsgel, Observ.* 1 *D. Obs.* 42; *Handv. Van Amsterdam*, 2 *D. bl.* 551. If, therefore, the 6th section of the *Placaat* was introduced into the Colony by the Dutch Settlers, it has become obsolete from non-observance. There is no trace from the records of the Courts of this 6th section of the *Placaat*, or Edict, ever having been applied, or even known, in the Colony from its foundation, about the year 1650. Indeed, great doubt exists as to what Statute Laws of *Holland* were introduced in the Colony. This fact is noticed in the Introd. to the *Cape of Good Hope* Statutes, p. 6 [Ed. 1862]. It appears to have been first noticed by the Supreme Court at *Cape Town* in the year 1856, in the case of *The Trustees of South African Bank* v. *Chiappini* (1), and was, as we contend, wrongly, held to be the existing Law of the Colony; but in the case of *Dyason* v. *Ruthven* (2), in 1860, where another section of the same *Placaat* was in question, the Supreme Court held that the Edict had become obsolete by non-observance. But even if this 6th section has not become abrogated by non-observance and disuse, it has been repealed, either expressly or impliedly, by the Proclamation of 1805, and the Insolvent Ordinances passed in the Colony. The Proclamation of 1805, with respect to the registration of marriage-contracts, *Cape of Good Hope* Statutes, p. 31, Ed. 1862, would be invalid if the 6th section was in force; and again the Ordinance, No. 6 of 1843 (3),

(1) 2 Buchanan's Cape of Good Hope Reps. 143.

(2) This case was heard by the Supreme Court of the *Cape* in March, 1860, and the report in the *Argus* Newspaper of the 22nd March, 1860, was referred to in the argument.

(3) This Ordinance enacts as follows:—

"Whereas the Law as contained in the Ordinance, No. 64, bearing date the 6th of August, 1829, and intituled 'An

repeals it. That Ordinance is intended to be a complete Code of Bankruptcy Laws framed on the model of the English Bankruptcy Laws. It declares that insolvent estates in the Colony should thereafter be administered under one uniform system of law, and expressly abolishes *cessio bonorum*, which, in effect, involved the abolition of the 6th section of the *Placaat*, and it repeals "all laws and customs heretofore in force in this Colony, in so far as the same are repugnant to, or inconsistent with, any of the provisions of this Ordinance." It cannot be supposed that the Legislature intended to leave the harsh provisions of the 6th section of the *Placaat* of 1540 in force. If it was known as part of the law in the Colony, the Ordinance must have meant to repeal it; if it was not known, then, *à fortiori*, it had become obsolete from non-observance.

Third, even, on the assumption that the 6th section of the *Placaat* was adopted, and is part of the law of the Colony of the *Cape of Good Hope;* yet it cannot affect this Marriage Settlement. The domicile of both Husband and Wife was English. The Settlement was in the English form, and must be governed by the *lex loci contractus*, which in this case was *England*. *Story*, Conflict of Laws, § 276, states that "the general rule is in no cases more

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Ordinance for regulating the due collection, administration, and distribution of Insolvent Estates within this Colony,' requires certain additions and alterations. And whereas it is expedient, in order that the said additions and alterations may most conveniently be made, that the said Ordinance No. 64 should be repealed, and a new Ordinance enacted in its stead: And whereas it is also expedient, that all Insolvent Estates within this Colony should be hereafter administered under one uniform system of law, and, to that end, that the benefit or relief of cession of goods and property, commonly called the *cessio bonorum*, now available to Insolvent debtors in this Colony, should be abolished: Be it, therefore, enacted by the Governor of the Cape of *Good Hope*, by and with the advice and consent of the Legislative Council thereof, that from and after the passing of this Ordinance, the Ordinance aforesaid No. 64, and the publication of the 4th of September, 1805, respecting transfers, cessions, pledges, and other securities entered into by Debtors within twenty-eight days previous to their insolvency, and so much of Ordinance No. 5, 1842, intituled 'An Ordinance to provide for the lodgment elsewhere than in the Government Discount Bank of this Colony, of certain moneys now by law required to be lodged in the said Bank," as is in substance hereinafter set forth and re-enacted,—and all laws and customs heretofore in force within this Colony, in so far as the same are repugnant to, or inconsistent with, any of the provisions of this Ordinance, shall be, and the same are hereby respectively repealed,"

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firmly adhered to, than in cases of nuptial contracts and settlements, which are construed and enforced according to the *lex loci contractus*," and he refers to *Anstruther* v. *Adair* (1), where it was held, that if a contract is made between persons domiciled in a Foreign Country, in a form known to that Country, the Court, in administering the rights of parties under it, will give it the same construction and effect as the Foreign Law would give it. The sixth section of the *Placaat*, if it applies at all, is confined to marriages contracted according to Dutch Law, instances of which are to be found in *Menzie's* Reports, p. 144, in his prefatory remarks on the cases relating to marriage; *Grotius*, Intro. to Dutch Jurisprudence, pp. 109, 114 [Trans. by *Herbert*]; *Van der Keessel, select Theses* on the Law of *Holland, pla.* 25, 216, 255, 257, 263, 269 [Trans. by *Lorenze*, Ed. 1868, by *J. de Wal.*] The section, therefore, even if law in the Colony, is not applicable to the present case. It is clear that the effect of the section is only to postpone the Wife's claim to ordinary Creditors where the marriage was according to the Dutch Law, by which Law the Wife had a compensating right conceded to her; therefore, even if the *lex loci concursus creditorum* prevails in the distribution of assets where the Law is not in terms inapplicable, the sixth section of the *Placaat* of 1540, being inapplicable, cannot affect the case. Again, sections 2 and 5, relating to Bankruptcy, are penal, and, therefore, could not affect acts done beyond the Colony. [LORD CAIRNS:—Might there not be preferences other than by way of security? Suppose a marriage not in community, but under the *jus dotium*, and the contract duly registered.] In that case the Wife, without express security by Bond, would have a legal preference for her dowry, and it would be a hypothec binding all the Husband's property, beyond the case of *concursus*, as in the case of alienation.

Fourth, the Deed of hypothecation of the 20th of August, 1863, is not void, even so far as regards the interests in question in this suit, as having been made by a Husband in favour of his Wife; but in strict form what it ought to have been, and such as the Appellants have adopted—namely, a deed in favour of the Trustees. The Appellants are Creditors for a valuable consideration on behalf of *Paterson's* Wife, and must be allowed to prove concurrently with other Creditors. Under the deed of hypothecation the Appellants

(1) 2 Myl. & K. 513.

are entitled to rank, not merely as concurrent, but as preferent Creditors for £13,000. If the Wife's interest under the Marriage Settlement is to be postponed to the claims of ordinary Creditors, the hypothecation, so far as it is in her favour, but being made during coverture, cannot give her further rights; but as respects the Children's interest the Deed gives them a preference, and the Supreme Court, as a Court of Equity, ought to have reformed it. Although the Marriage Settlement was not registered, that fact does not invalidate the Deed of hypothecation which was registered in the Colony.

Then, lastly, as to the Respondent's claim in reconvention to refund the £7,000. The Appellant, *Paterson*, at the time he remitted that sum to his co-trustees did not contemplate the sequestration of his estate, either voluntarily or otherwise, or intend thereby to prefer, directly or indirectly, the Trustees before his other Creditors. He was then perfectly solvent. It was not a preferential payment which could be avoided by the Insolvent Ordinance, No. 6, of 1843, sec. 84. The facts of the case are *pari passu* with English law, and, in the circumstances, would not have been held void here. In *Morgan* v. *Brundrett* (1), it was held, that a party who seeks to avoid a payment, or transfer of goods, on the ground that such transfer was made voluntarily by a Trader in contemplation of Bankruptcy, must shew not merely that the Trader was Insolvent when it was made, but also that he then contemplated Bankruptcy: *Abbott* v. *Burbage* (2). There Mr. Justice *Park* states the true rule to be, "whether Bankruptcy was in contemplation at the time of the execution of the deed." Here it clearly was not, as the Appellant, *Paterson*, was perfectly solvent at the time.

Sir *R. Palmer*, Q.C., and Mr. *Busk*, for the Respondents:—

With respect to the first objection, that the 6th section of the *Placaat* of 1540, and the suggestion of its harsh operation in respect of the Wife of a Trader having an ante-nuptial settlement, it is enough to say that such provision was part and parcel of the Roman-Dutch Law introduced into the *Cape* on the settlement by the Dutch in 1650. The Dutch, a trading and mercantile community, having such a law, would naturally introduce it as essentially applicable for

(1) 5 B. & Ad. 289. (2) 2 Bing. N. C. 444.

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the protection of Creditors. All the authorities on Roman-Dutch Law shew that the *Placaat* was an integral part of the Dutch Law, in full force in *Holland* then as it is now, and necessarily, therefore, in the *Cape* Colony, or wherever else the Roman-Dutch Law prevails. *Grotius*, Intro. to Dutch Jurisprudence, B. II., ch. XII., s. 17 [Trans. by *Herbert*], refers to this section of the *Placaat;* so *Voet.*, *Pand.*, B. XXIV., tit. 3, ch. 25; *Van Leeuwen*, *Censura Forensis*, B. IV., tit. II., s. 13 [Ed. by *Gerhardus de Hass*, 1741]; and *Van der Keessel*, B. II., ch. XII., sec. 16, *pla.* ccviii., in a note, expressly relies upon this *Placaat*, and refers on that point to a decision of the Supreme Court of the 27th July, 1612, in *Neostad. de Pact Antenupt.* Obs. 10, n. (b.); *Van der Linden*, B. I., sec. IV., p. 76 [Trans. by *Henry*], and by *Tennant*, in his Notary's Manual, pp. 9, 10, 109, 304 [2nd Ed.]. The question now raised is, whether if this *Placaat* was ever introduced in the Colony, it has not been abrogated, either by disuse, or repealed by the *Cape* Insolvent Ordinance. The Civil Law as to abrogation by custom is not satisfied by mere non-user. It may be that non-user is evidence of abrogation of a law which imposes penalties, where no case is shewn of penalties being enforced; but it goes no further, and cannot apply to a Law regulating the distribution of a Bankrupt's assets. The authorities on Roman-Dutch Law already cited, and the case of *The Trustees of South African Bank* v. *Chiappini* (1), shew that the provisions of the 6th section of the *Placaat* were well known in the Colony. *Dyason* v. *Ruthven* is not applicable, and is no authority for the Appellants, as it was from the Dutch, and not the *Cape* Government, which led Mr. Justice *Dwyer* to infer that the particular section of the *Placaat* in that case was obsolete. It is, indeed, a strong authority in our favour, as it is an admission that the *Placaat* in its entirety was introduced into the Colony. Neither have any of its provisions been repealed by the Proclamation of 1805 with regard to registration, nor by the Insolvent Ordinance, No. 6, of 1843. Nor can it be maintained that this *Placaat* is repealed as repugnant to that Ordinance. Then, if the *Placaat* is in force in the *Cape* Colony, we submit that it applies to this Marriage Settlement, although that Settlement was made in *England*. The Settlor, the Husband, had a mercantile domicile in the Colony, by reason of his house of trade,

(1) 2 Buchanan's Cape of Good Hope Reps. 143

at the time it was made, and that alone is sufficient: *Phillimore* on Domicile, § ccxvii.; *The Indian Chief* (1); *Story's* Conf. of Laws, §§ 325, 575, citing *Rodenberg;* and that principle is fully recognised in English Courts: *Este* v. *Smyth* (2); *Duncan* v. *Cannan* (3); *Hog* v. *Lashley* (4). There is nothing to be found in the 6th section of the *Placaat* to limit its provisions to Marriage Settlements made in the Dutch form. The words in the *Placaat,* "saving to the Wives and Widows their right of preference, as it is competent to them by reason of their marriage portion brought into the marriage have no reference to a tacit hypothec which by Dutch law confers on the wife exclusion of community of goods."

As regards the Deed of hypothecation by *Paterson* of his realty in the *Cape* in favour of his Wife, such Deed is of no value as affecting the priority of the claim of the Wife as against the Settlor's Creditors, as the Marriage Settlement on which it is founded was not registered in the Colony, as required by the Law of the Colony: Cape of *Good Hope* Statutes, pp. 3, 19, 25, 108, and 809. *Denyssen* v. *Botha* (5) shews that the requirements of the Cape Ordinances must be strictly complied with. Independent, then, of of the 6th Article of the *Placaat,* that deed is void for non-registration. As the Deed of hypothecation does not purport to give the children of the marriage any priority, or to benefit them, there is no sufficient ground upon equitable principles to call on the Court to rectify it. The decree on this point is in strict conformity with the justice of the case and the Law of the Colony.

Lastly, with respect to our claim in reconvention as Assignees of the Insolvent's estate against the trustees of the Marriage Settlement, it is clear, on the authority of *Smith* v. *Carpenter* (6), decided by this Tribunal on the same 84th section of the Insolvent Ordinance of 1843, that the Court below was perfectly right in holding that the payment of the £7,000 by *Paterson,* himself a Trustee, was an undue preference, and the Trustees of the Settlement are liable to pay the Assignees of the Bankruptcy. It would be so by English Law: *Shelford* on Bankruptcy, pp. 182, 184, 186, where all the authorities are collected; and the English *Bankruptcy*

(1) 3 Rob. Adm. Rep. pp. 12, 27.
(2) 18 Beav. 112.
(3) Ibid. 128.
(4) 6 Brown's P. C. 578; S. C. Robertson, Per. Suc., App. 395.
(5) 13 Moore's P. C. Cases, 352.
(6) 12 Moore's P. C. Cases, 101.

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Act, 32 & 33 Vict. c. 71, s. 91, as to avoidance of voluntary settlements. It is laid down by *Story's* Confl. of Laws, § 575, that the *lex loci concursus creditorum* in a case of conflict of laws governs the distribution of assets, and that doctrine has been acted on here in *Ex parte Melborn* (1), where the Lord Justices held, in the case of a marriage contract made in *Batavia*, and the Husband being made a Bankrupt in *England*, that all questions of priority of Creditors must be determined by the law of the Country where the Bankruptcy took place.

Mr. *J. Brown*, Q.C., in reply :—

The Respondents' contention, that the 6th section of the *Placaat* of *Charles* V. is now the law in force in the *Cape of Good Hope* is contrary to the recognised principle of our law with respect to the introduction by Settlers into an infant Colony, who carry with them only such laws as are requisite for them, and as the necessity of the Colony requires: *Bla.* Com. vol. I. p. 107; *Burge's* Coms. on Col. and For. Law, Vol. I. p. xxxii. Such a Law as this *Placaat*, from its very nature, was inapplicable to the circumstances when the *Cape* Colony was founded. The early Dutch Colonists were not likely to have had any Marriage Settlements. It was never suggested as being part of the law in force in the *Cape*, until it was referred to in the case of *The Trustees of South African Bank* v. *Chiappini* (2) in the year 1856. But if it was introduced into the Colony its provisions were repealed by the effect of the *Cape of Good Hope* Insolvent Ordinance, No. 6, of 1843. [LORD CAIRNS :—That might be if the Ordinance contained a complete Code of priorities ; but there are indications the other way. (His Lordship referred to the *Cape* Statutes, p. 592 [Ed. 1862], as to composition, and to p. 594, as to rights of preference.)] The preferences referred to apply to mortgages and liens. [LORD CAIRNS :—Sect. 30 applies to secured Creditors.] Then with respect to the mercantile domicile of the Appellant, *Paterson*, at the time of the Marriage Settlement, that cannot affect the Settlement, as the law of the place where, at the time of marriage, the parties intend to fix their domicile governs all the rights resulting from marriage: *Story's* Conf. of Laws,

(1) Law Rep. 6 Ch. 64. See also *Ellis* v. *McHenry*, Law Rep. 6 C. P. 228.

(2) 2 Buchanan's Cape of Good Hope Reps. 143.

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§§ 192-3. The payments by the Appellant, *Paterson*, to the Trustees on account of the Settlement were not at the time preferential. They were not in contemplation of Bankruptcy, and, therefore, such payments were not void: *Atkinson* v. *Brindall* (1); *Worseley* v. *Demattos* (2). The case of *Smith* v. *Carpenter* (3) is distinguishable; there the Debtor assigned the whole of his property. Under any circumstances we are entitled to rank as covenanted Creditors, if not preferential ones.

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Jan. 26.

Their Lordships' judgment was pronounced by

LORD CAIRNS:—

The first question which arises in this appeal is one of very considerable consequence to the Colony from which the appeal comes—namely, whether the 6th section of the *Placaat* of the Emperor *Charles* of 1540 is or is not in force in the Colony.

Now, in determining that question their Lordships have nothing whatever to do with the policy of the *Placaat*, or with the expediency of retaining or not retaining it as part of the law of the Colony. Their function is only to determine, whether it is part of the law at the present time. The 6th section of the *Placaat* contains provisions which, according to our ideas on the subject, are obviously of a kind entirely adverse to the principles upon which similar laws in this Country have been passed. Nothing to us can appear to be more unjust than to make void *bonâ fide* provisions on behalf of a Wife and Children entered into before marriage. Nothing to our ideas can be more inconsistent than an Ordinance which would make void the provisions made under such circumstances for the Wife, and leave those made for the Children untouched; nothing, according to our ideas, can be so unnecessary as an Ordinance containing provisions of that kind, extending, as it is said this Ordinance would extend, to the case of non-traders as well as to the case of Traders. But with those considerations we have at present nothing whatever to do. They are considerations for the Legislature which exists in the Colony, and which has the power, if it is so minded, to put an end to this Ordinance, if it is now part of the Law of the Colony.

Now, the *Placaat* to which I have referred is one containing a

(1) 2 Bing. N. C. 444. (2) 1 Burr. 467. (3) 12 Moore's P. C. Cases, 101.

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great number of heads; we are told that there are upwards of one hundred heads or divisions in the *Placaat*. Of the heads which we have seen of the *Placaat*, some, upon the face of them, have clearly come to an end from their very nature, and are no longer applicable. One of them, which has been referred to in the argument, has been repealed by a modern Statute in the Colony. These heads, however, are distinct in their nature and in their character. The *Placaat* is more in the nature of a Code of law than of a Statute upon one particular branch of law. It may well be that the fate which has attended one division of the *Placaat* may be altogether different from that which has attended or should attend another division of the *Placaat*. The sixth division provides for the case of settlements made in consideration of Marriage. It is not necessary to read it at length, as it has been so frequently read at the Bar. Beyond all doubt this sixth division of the *Placaat* formed a part, and a prominent part, of the law of *Holland* at the time of the Settlement of this Colony. It is found mentioned and explained in all the Institutional writers on the Roman-Dutch Law of the greatest authority, beginning with *Grotius* and ending with *Van der Keessel*. It had become annexed to—or perhaps I might say, incorporated into—the Roman-Dutch Law which then prevailed with regard to the *cessio bonorum*, and indeed into any proceeding under that Roman-Dutch Law for the administration of assets. It pointed out the mode in which, as regards claims under marriage Settlements, the assets of those who had made those Settlements ought to be administered.

The question arises, then, when the Colony of the *Cape of Good Hope* was settled, was or was not this sixth section of the *Placaat* part of the body of Dutch Law carried by the Colonists into their new Settlement? Now, that is a question which always is one of difficulty. A passage was read to us from Mr. Justice *Blackstone's* Commentaries, which states, with regard to the case of English Colonists, that they carry with them so much of English law as is applicable to their own situation. But upon that statement the observation of Lord *Cranworth* is well worthy of repetition, where, in the case of *Whicker* v. *Hume*, before the House of Lords (1), he says: "Nothing is more difficult than to know which of our

(1) 7 H. L. C. p. 161. 4 Jur. N. S. 938

laws is to be regarded as imported into our Colonies;" and, adverting to the expression "laws adapted to the situation of the Colony," Lord *Cranworth* puts this question: "Who is to decide whether they are adapted or not? That is a very difficult question." But in this particular case their Lordships consider that the difficulty is not so serious as in many other cases it has been found to be. It is to be borne in mind that the first possession of the *Cape of Good Hope* by the Dutch was connected with, if not mainly with a view to, the greater enjoyment of their Indian possessions. The Dutch at that time were a commercial nation, and their settlements in the *East Indies* were of a commercial character. In the middle of the seventeenth century, when the permanent settlement of the Dutch at the *Cape of Good Hope* was made, and when *Cape Town* was founded, it is scarcely possible not to believe that the Dutch anticipated that this Colony would become a commercial station half-way between their own Country and their East Indian possessions, and that it would be a place where or from which trade and commerce would be carried on. Under those circumstances it is difficult to imagine that, not enacting in the Colony any new or special Bankrupt Statute of their own, they would do otherwise than intend to carry, and suppose they had carried, to the Colony the Bankruptcy Law which they possessed in their own Country; and into that Bankruptcy Law, as I have already stated, the sixth provision of the *Placaat* of the Emperor had of necessity inserted and adapted itself in the administration of the estates of Bankrupts.

Their Lordships, therefore, are of opinion, that this would be, and was, a part of the law of *Holland*, carried along with them by the Colonists into their new settlement. Beyond all doubt this *Placaat* must have been known from that time forward in the Colony. Their Lordships cannot adopt the expressions which have been used, that the sixth division of the *Placaat* was one that was unknown in the Colony, and never heard of till comparatively modern times. It was, as has been said, referred to by all the Institutional Writers, which were the Institutional Writers recognized in the Colony, and appealed to in the Colony upon all questions of Roman-Dutch Law. It is especially referred to in one of the latest Dutch Institutional writers, *Van der Keessel*, in his Book of

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Theses—a Book in use in the Colony, and it appears reprinted in the Colony for the use of the Colony. Moreover, another portion of the *Placaat*, as I have already said, was repealed by express Statute in the Colony, and, therefore, the *Placaat*, as a whole, cannot have been unknown in the Colony.

It is scarcely to be supposed that as regards Institutional Writers, if what was laid down by the Institutional Writers of *Holland* in use in the Colony was not accepted in the Colony, and if a different practice obtained with regard to Marriage Settlements from that which they describe, some trace would not be found of Institutional Works in the Colony, or of some of the *Dutch* Books in the Colony reprinted there, taking notice that this which was referred to by the *Dutch* Institutional Writers was not accepted in the Colony as part of their practice.

It is said, however, that in point of fact the sixth division of the *Placaat* has never been applied in the Colony, and that the practice in the administration of assets has been at variance with, and contrary to, that which would have prevailed under that division of the *Placaat*. Now, it is sufficient to say on that head, that no evidence whatever of those statements has been adduced. It lay upon those who made the assertion to establish it. It is impossible to think that if a contrary practice had prevailed in the administration of assets, some proof could not have been given; and none has been given in this case.

As regards decided cases, their Lordships find that in the year 1856, in the case of *The Trustees of the South African Bank* v. *Chiappini* (1), the sixth division of the *Placaat* was referred to and made the ground of decision. From that decision there was no appeal, and it is somewhat remarkable that one of the learned Judges states that that decision created great surprise in the Colony, and great consternation among the mercantile classes in the Colony; and it may, perhaps, be matter of surprise that a Settlement executed, as the Settlement in the case now before their Lordships was executed, in the year 1863, was under those circumstances made, as it appears to have been made, in ignorance of a Statute,—of a *Placaat*, the enforcement of which had created so much astonishment in the Colony.

Their Lordships, therefore, upon this first part of the case cannot

(1) 2 Buchanan's Cape of Good Hope Reps. 143.

do otherwise than arrive at the conclusion at which the majority of the learned Judges in the Colony arrived, that whether this division of the *Placaat* be, as a matter of policy, expedient or inexpedient, it is (subject to any effect upon it which the Colonial Insolvency Ordinance may have) part of the law of the Colony at the present time.

We have next to consider what is the meaning of this *Placaat*, and, in the first place, does it include all Spouses, no matter where the Marriage may have been celebrated, and no matter what the domicile of the Spouse at the time of the Marriage may have been? As regards the power of any Country in the matter of Legislation, there is no reason whatever why it should not include all Spouses. The *Placaat* points to a course of distribution of assets in a *concursus* of Creditors, and the proper order and priority of distribution of assets is always a matter for the *lex fori*, and the Country where the distribution takes place always claims to itself the right to regulate the course of distribution. We may remember that in our own Country in a Bankruptcy taking place in *England*, and in the administration in *England* of assets under a Bankruptcy, we should pay specialty and simple contract debts equally, even although the Country in which one of the debts was contracted might recognise the distinction between those two classes of debts, and give a priority to specialty debts over simple contract debts. In like manner, in other cases less important, we give a priority to certain classes of Creditors, such as those claiming for wages, those claiming for rent, those claiming on behalf of Friendly Societies—we give to them a priority over other Creditors of the Bankrupt, even although those other Creditors might be such by reason of contracts entered into in Foreign Countries, where the domicile of these Creditors, and, perhaps, of the Bankrupt, might be situated, and where no such priority might be recognised. We take no notice of the origin of the debts of other Creditors; we take upon ourselves the right of regulating in those instances which I have mentioned the application of the assets.

Well, then, it being within the customary power possessed by all Countries of Legislation, are the words of this division of the *Placaat* large enough to include the cases of all Spouses. Their Lordships are of opinion, that they clearly are sufficiently large.

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The 6th section states that "whereas many Merchants take upon themselves to constitute in favour of their Wives large dowers, and excessive gifts and benefits upon their property, as well in consideration of marriage, as to secure their property, with their aforesaid Wives and children, and afterwards are found to become insufficient to pay and content their Creditors, and wish to have their Wives and Widows preferred before all Creditors, to the great injury to the course of Commerce; we will and ordain that the aforesaid Wives, who henceforward shall contract marriage with Merchants, shall not be entitled to pretend to have or receive any dower, or any other benefit on the property of their Husbands, or to take part and share in the acquisitions made *stante matrimonio* by the Husbands." There is no reason in the ordinary course of Legislation why the words should be confined. The words are themselves of the largest and most general description, and their Lordships find no ground upon which they ought to be confined.

It was said, indeed, that there was a stipulation at the end of this division, reserving to Wives and Widows their right of preference "as the same is competent to them by reason of their marriage portion brought by them into the marriage." It was said that that reservation pointed to a right possessed by Wives marrying under the Roman-Dutch Law, and not possessed by Wives marrying under other laws. It may very well be that that is so. Their Lordships express no opinion upon the point; but, supposing that that is so, the reservation to Wives marrying under a particular system of law of a right which they have under that law, would not of itself control the application of the *Placaat* to Wives generally, but would be a reservation to a particular class of the right which that class alone already possessed.

The *Placaat*, then, being, in their Lordships' opinion, in force originally in the Colony, in force up to the present period; and the words of it being large enough to include the case of a marriage such as took place between the Appellant in this appeal and his Wife,—we have next to consider, whether this division of the *Placaat* has been repealed, as was argued, by the Colonial Insolvent Ordinance of 1843. In order to determine this point we have to assume that immediately before the Ordinance of 1843 was passed, the *Placaat* was part of the law of the Colony. Now, the Ordi-

nance of 1843 states, that it is expedient that a previous Insolvent Ordinance of the Colony of 1829 should be repealed, and a new Ordinance enacted in its stead. It states that, "It is also expedient that all insolvent estates within this Colony should be hereafter administered under one uniform system of law, and, to that end, that the benefit or relief of cession of goods and property, commonly called the *cessio bonorum*, now available to insolvent Debtors in this Colony, should be abolished." It then proceeds to repeal certain Ordinances by name of the years 1805 and 1842; and it proceeds further to repeal "all laws and customs heretofore in force within this Colony in so far as the same are repugnant to, or inconsistent with, any of the provisions of this Ordinance." The only words, therefore, which can be relied upon are the words repealing the *cessio bonorum*, and the words repealing any Ordinance, any laws or customs, repugnant to or inconsistent with the provisions of the Ordinance of 1843. With regard to the repeal of the *cessio bonorum*, their Lordships take notice that the 6th section of the *Placaat* of the Emperor does not refer in terms to the *cessio bonorum*, but is rather a provision incorporating itself with any law which for the time being might prevail with regard to the administration of the assets in any Country where the *Placaat* was to take effect.

Their Lordships have then looked with considerable anxiety to discover, whether any of the provisions in the Insolvent Ordinance of 1843 are repugnant to or inconsistent with the sixth division of the *Placaat*. Now, the Ordinance of 1843 is one of considerable length. It provides in great detail for the practice in Bankruptcy, and to a great extent for the law applicable in the case of Bankruptcy. If their Lordships had found on the face of this Ordinance that it was a complete and exhaustive Code of the existing law applicable to cases of Bankruptcy, they would have felt the argument to be one of great force which maintained that any pre-existing law or Ordinance must be considered to be swept away, and to be substantially inconsistent with the new, complete, and consolidated Ordinance on the subject of Bankruptcy. But, on looking at the Ordinance, their Lordships do not find that this is its character. They may refer, in particular, to two sections which were mentioned in the course of the argument, the first of which is section 106. That deals with the case of the offer of composi-

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tion made by the Insolvent. It provides that a meeting of Creditors is to be called; the Insolvent is to take a particular oath; the Court may pronounce a discharge of the Insolvent; and then it provides "that nothing in this section contained shall be construed so as to affect the right of any Creditor entitled by law to be paid in preference in so far as such Creditor shall be so entitled, unless he shall consent to give up his preference, and be bound by the composition." And in section 107, the Trustee under the composition is to render accounts to the Court, and he is to form a general plan for the distribution of the assets of the estate, "specifying first, such Creditors as are preferent by law in the order of their legal preference; and secondly, the concurrent Creditors, and, as nearly as may be, the probable balance which will remain for division amongst them."

Now, the provision of the *Placaat* upon this head, if it is anything, is a provision dealing with the priority, the rank of Creditors, and putting certain Creditors before one or more certain other Creditors. The Ordinance of 1843, therefore, when we look at it, speaks of preferent Creditors and of Creditors having preference by law, as terms known to the law—terms, the explanation of which is to be sought for, not in the Ordinance itself, but in the law or laws of the Country outside the Ordinance. Their Lordships are unable to place any limit upon those words, and other words in the Ordinance might be found of the same character as those which I have read. They feel referred by those words to the general law of the Colony *dehors* the Ordinance, and they consider that those words would clearly let in and amalgamate with the Ordinance of 1843, a law such as that contained in the 6th section of the *Placaat*. That section, therefore, in their Lordships' opinion, would not be repugnant to or inconsistent with the Ordinance. It might be inserted in the Ordinance, and read as it is read upon the *Placaat*, and would be entirely consistent with the other parts of the argument. That view of the case might be further illustrated in this way. If the *Placaat*, in the place of the provisions which it contains, had given to the Wife a priority and a preferential right over all other Creditors, it is quite clear that the *Placaat* in that form would have been exactly one of those provisions of the law shewing what in that particular case was a

preferent claim; and their Lordships are unable to see any difference in the circumstance, that the priority is not given to the Wife, but given to the other Creditors of the Husband.

Their Lordships, therefore, on the whole of this part of the case, come to the conclusion, that the sixth head of the *Placaat* was in force in the Colony; that it was not repealed by the Insolvent Ordinance of 1843, and that, in its terms, it meets the present case, and postpones the claim under the marriage contract as regards the Wife until the other Creditors of the Husband have been paid. What those other Creditors are will be considered presently.

We proceed, however, now, to the next subject of the appeal, namely, the payment of £7,000, by Mr. *Paterson* to the Trustees of the Settlement, which is impeached upon the ground, that within the 84th section of the Ordinance of 1843 it is an undue preference of one Creditor to another. That section enacts, "That every alienation, transfer, cession, delivery, mortgage, or pledge of any goods or effects, moveable or immoveable, personal or real, and every payment made by any Insolvent to any Creditor, such Insolvent at the time contemplating the sequestration, either voluntary or otherwise, of his estate, and intending thereby to prefer directly, or indirectly, such Creditor before his other Creditors, shall be deemed to be an undue preference, and is hereby declared to be null and void." The majority of the Court below have held, that the payment of the £7,000 in question was an undue preference within the meaning of this section, and that the claim in reconvention of the Assignees of the separate estate ought to prevail, and under it they ordered the money to be paid back. Whether in any particular case a payment impeached in Bankruptcy is a payment by way of undue preference or not, is a question of fact to be considered by a jury if the case comes before a jury; by the Court, if the Court performs the function of judging of the facts of the case. And, if in this case there had been a conflict of evidence, and questions had arisen with regard to the credibility of witnesses, their Lordships would been extremely slow to differ from the decision arrived at by the Judges below. There is, however, in this case, no conflict of fact whatever. The evidence as given, so far as it is oral, is upon one side, and is not in any way impeached; so far as it is documentary, it is before the Court, and it is a ques-

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tion of the proper effect of that oral and that documentary evidence. The *onus* of proof, of course, lies upon those who impeach the payment as having been made by way of undue preference. It is well settled by authorities in this Country, which would regulate the construction put upon those words by our Courts, that the mere insolvency of the person making the payment is insufficient. The mere fact that at the time of the payment the whole of his property would not be sufficient to pay the whole of his debts, is not sufficient. It is a circumstance, an ingredient in the case, to be considered with all the other circumstances of the case. The payment, however, must be made in contemplation of Bankruptcy, or, in this case, of sequestration. The words "contemplating sequestration" are words on which, perhaps, some criticism may well be bestowed, but they have received by the construction put upon them, the meaning that the Court, judging of the fact, must be satisfied that the payment was made in the view and in the expectation of a supervening Bankruptcy, and in order to disturb what would be the proper distribution of assets under that Bankruptcy. Whether it was made with that intention, or not, is not only a question of fact, but, being a question of intention, the intention must be arrived at by considering the probable motives which would arise to influence the person making the payment towards making it, or towards retaining the money in his own possession.

Now, there is at the outset an observation to be made in this case, to which their Lordships cannot but attach very great weight. Mr. *Paterson*, the Bankrupt, had executed a Settlement before his marriage. He was at that time, in what may be termed, affluent circumstances. He had in that Settlement not only covenanted to pay the sum for supplying an annuity to his Wife on his death, and a provision for his younger Children, but he had covenanted to give a Mortgage upon specific property possessed by him at the *Cape*, to secure a considerable part of the money he had covenanted to pay. That Mortgage he had actually given in the same or in the following year—in the year 1863. He had given it, as he thought, effectively and well, in the shape of a Bond of hypothecation executed in the Colony, to his Wife,—a Bond of hypothecation of the property which he had agreed to mortgage.

That property was of ample value, and so far as it appears, it was not encumbered. Mr. *Paterson* says, and there seems to be no reason to disbelieve his statement, that he was quite ignorant of the *Placaat*, that he was under an impression that the mortgage he had given was valid, and that it was given in sufficient form, although nominally given to his Wife. Therefore, as regards his other Creditors, the position of things was this: Mr. *Paterson* was a Mortgagor who had given one Creditor, namely, his Trustees, a mortgage of ample value to secure the debt owing to that one creditor. If Bankruptcy had supervened in the view which he took of the law, and of the facts of the case, that Creditor was entirely protected; the property would have been sold and he would have been paid in full. There was, therefore, no possible motive in that state of things, and in that view of the case no possible motive that can be attributed to Mr. *Paterson*, to make a payment to the Trustees that would disturb the position of the other Creditors, or to give the Trustees a right they would not otherwise have.

Then, as regards the evidence in the case, it is perhaps unnecessary that it should be read at length, as it has been read more than once at the Bar. But it clearly amounts to this: Mr. *Paterson's* Firm was trading at the *Cape of Good Hope*. In the year 1865 several persons indebted to them failed. Mr. *Paterson* was living in *London* till November, 1865, he then came over to the *Cape;* he found, as he says, that his Partners had paid every Creditor except the two Banks, the *Standard*, and the *London and South African*, and *Blaine & Co.*, and a few small debts to others —*Blaine's* debt being £650. He waited on the Managers of the Banks; he thought that the personalty which they had in security, if taken at the price at which it had originally stood, which was probably a higher price than could have been obtained for it, would have been enough to clear him; but that, on going over the value of his landed property, it shewed, according to his judgment, between £30,000 and £40,000 clear, including Mrs. *Paterson's* Bond, and taking the land at ten years' rental. He gave to the Banks a full statement of his affairs; and he ultimately, in the month of July in the year 1866, passing over for the moment the intervening transactions, gave to the Banks security for £30,000

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and upwards, for the purpose of enabling them to realize his property to pay his Creditors, including those who were the largest and main Creditors at the *Cape*. He says that that security was given, and indeed it is obvious that it would be given, not with a view to sequestration, but to prevent sequestration, and with an understanding that there was to be no sequestration claimed by his Creditors.

Then, with regard to the payment of the £7,000, he says that, in September, 1865, he had made a bargain in *London* with one *Joseph* for the sale of property, part of which was included in the deed of hypothec under the Marriage Settlement; that he completed the sale to *Joseph* as to the property not so included; he could not complete the sale as to the property included without a release on the part of the Trustees, and that it was an object to obtain that release.

Now, it is to be remembered that the Marriage Settlement had provided that, upon paying to the Trustees £13,000 as a sufficient sum to meet the obligations of Mr. *Paterson* for the payment of the annuity to his Wife, and £5,000 on account of the Children's provision, the Trustees should execute a release or discharge of the hypothecated land. By depositing this considerable sum with the Trustees he could obtain a release of the hypothecated land. He says that he sent to the Trustees £4,000 in the first instance, and he afterwards remitted £3,000, making in all £7,000.

It ought to be added that on the 11th of May, 1866, upon making a statement to the Bank of all his separate creditors, he added at the end of this statement, "The Trustees of Mrs. *Paterson* and Children claim to be secured in £18,000, and £5,000 additional, claim not secured. Security Bond given for £13,000 over *Port Elizabeth* property, and Agent instructed in *England* to communicate with the Trustees there, and meet, as far as possible, from remittances sent to him, the Trustees' demands. The remittances were, £4,000 in February, £1,800 and two Bonds, nominal value £1,500, in April." "P.S. The Bonds above referred to are—Bond of *Wm. Machin* for £1000; Bond of *J. Geard* for £500. Remitted proceeds to be paid over to Trustees of Mrs. *Paterson*. £1,800 remitted direct to Trustees, and £4,000 to Captain *Henry Thurburn*, to be paid to Trustees."

There was, therefore, on the one hand, no motive whatever in the view Mr. *Paterson* took of the rights of the Trustees to prefer Creditors who were already very well secured. There was, on the other hand, the obvious motive to liberate the property at the *Cape* from the hypothec,—property, some of which he was already engaged in selling, and other part of which it would be clearly convenient for him to be able to deal with there. He could not do that without paying the large sums of £13,000 and £5,000. It was very unlikely that he would be able to pay all that in one sum. The natural course, therefore, would be to make remittances to the Trustees, from time to time, as he was able to do it, in satisfaction of their claim, and that appears to have been the course on which he was engaged, a course the propriety of which he was so well satisfied of, that at the very first moment of negotiation with the Bank as to their security, he appears to have stated accurately and correctly the facts as they had taken place.

The arrangement, then, was made, as stated, with the Bank, for assigning and hypothecating the property subject to these securities to them; and for many months no proceedings whatever were taken for the purpose of obtaining a sequestration. The arrangements which were made appear to have gone on for some time smoothly, and, if they had been completed, we never probably should have heard of this claim. Something, however (it does not appear exactly what), went amiss in the beginning of the year 1867, and, after a lapse of seven or eight months from the date of the arrangement made with Mr. *Paterson*, the Banks, or one of them, proceeded to obtain sequestration, and the sequestration issued in February, 1867.

Now, in this state of things, their Lordships are very much impressed by, in the first place, the absence of any motive on the part of Mr. *Paterson* to have given an unjust or unfair preference to his Trustees, for, as he thought, they were already secured. They are very much struck, in the next place, by the clear and reasonable motive there was for his making these payments for the purpose of liberating the land hypothecated; and they are, finally, very much impressed by the course taken in this case by the Banks, who are the authors of the sequestration, and beyond all doubt the substantial Respondents here, who were made aware, in the

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month of May, 1866, of the whole of this transaction, who did not in any way challenge it then, who proceeded to act upon the arrangement which then was come to,—an arrangement not contemplating that sequestration would take place, but providing that it should not take place,—who continued to act upon that footing till the month of February, 1867; and, taking those facts into their consideration, they cannot but arrive at a conclusion adverse, they regret to say, to the opinion of the Court below, and they cannot avoid believing that this was a payment not made in any way in contemplation of sequestration within the meaning of the Insolvent Ordinance, but was a *bonâ fide* payment by Mr. *Paterson* to the Trustees.

The result is, that their Lordships are prepared humbly to advise Her Majesty that the portion of the decree of the Court below which deals with the question of proof should in substance, and with a verbal alteration which will have to be referred to, be affirmed, and that the part of the decree which on the claim of Reconvention ordered the £7,000 to be repaid, and declared that it was a payment made in contemplation of insolvency, ought to be reversed. The verbal alteration to which I have referred arises in this way: the Court has declared "That the Plaintiffs are not entitled to rank either as preferent or as concurrent Creditors in respect of the value of the annuity provided to Mrs. *Paterson* by the Deed of Settlement, or under the Deed of hypothecation, in respect of the sum of £13,000 mentioned in that Deed, or any part thereof, until after the Creditors of *Paterson* shall have been paid their debts in full." The present Respondents, the Defendants in the action in the Court below, are the Assignees of the separate estate of *Paterson*, and it may well be that the words just read were intended to point and to be confined to the separate estate, and not to go beyond the separate estate. Their Lordships, however, think that the words are somewhat ambiguous upon the face of them, and that it is necessary to prevent mistake hereafter, more especially as they are informed that there is a joint sequestration against both the Partners in the course of prosecution in the Colony. Now, upon this part of the case the Insolvent Ordinance of 1843 does appear to their Lordships to have an important bearing as connected with the sixth division of the

Placaat. It may be that on a proper interpretation of the sixth division of the *Placaat*, it ought to be confined to the separate Creditors, as we should term it, of the Bankrupt. But, on the other hand, it may be said that the distinction between the administration of the estate of joint and separate Creditors is a creature of English law, or of the law of any Colony where it has been introduced. Whether that be so or not, their Lordships find precise provision made in the 34th and 36th sections of the Ordinance of 1843, upon this head. The 34th section provides, in substance, that where there are joint and separate Creditors the estate of the Company shall be first applied in satisfaction of the Creditors of the Company; and each separate estate shall be first applied in satisfaction of the separate Creditors of that estate before the surplus is carried over for the benefit of the joint Creditors. And the 36th section provides, that in every case not hereinbefore expressly provided for, and relating to the ranking and priority of the joint Creditors of any Company in competition with the separate Creditors of any of the Partners of such Company, or relating to the reciprocal claims of any such insolvent estates, in reference to or in relief of each other—the rule for the time being in respect of the like case according to the law and administration of Bankruptcy in *England* shall first be resorted to; and, failing any such rule, the Common Law of the Colony should be applied. Their Lordships appealed to the Counsel who argued for the Respondents, whether any reason could be shewn why those sections should not apply to the present case as regards the surplus, after the separate Creditors other than the Trustees of the separate estate were fully paid, and no reason was pointed out. Their Lordships think, that they are compelled by the provision of that section of the Ordinance of 1843, to hold that, although the separate Creditors, other than the Trustees of the Marriage Settlement, will have the preferential right to be paid, still that the Trustees of the Marriage Settlement are Creditors of the separate estate postponed only to the first class of Creditors, and that under the express provision of this Ordinance of 1843, they must, as such, be paid before the surplus of the separate estate is carried over for the benefit of the joint estate.

They, therefore, will humbly advise Her Majesty that the verbal

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alteration should be made in the first passage of the decree, to the effect that the Plaintiffs are not entitled to rank against the separate estate of *Paterson*, either as preferent Creditors, &c., until after all the separate Creditors of *Paterson* shall have been paid their debts in full.

Then, with regard to costs, what was done in the Court below was that the Plaintiffs were ordered to pay to the Defendants all the costs of the action up to that time. In the view that their Lordships take of the case, the claim of the Plaintiffs in the action fails, and the claim in reconvention fails also. Their Lordships think, therefore, that although the claim of the Plaintiffs in the action should be dismissed, as it was in the Court below, with costs, the claim in reconvention should also be dismissed with costs, or, in other words, that the Defendants should pay to the Plaintiffs in the action the costs of their claim in reconvention; and that, as this appeal has resulted in a substantial alteration in favour of the Appellants, but, as on the other hand, they have failed in a substantial part of their appeal, there ought not to be any costs of the appeal on either side.

ALTERATIONS TO BE MADE IN THE DECREE OF THE 12TH OF MARCH, 1869.

Judgment.	*Proposed Judgment.*
1. The said Court doth now, on this the 12th of March, in the year aforesaid, adjudge and declare that the *Placaat* of *Charles* V. is a subsisting operative law within this Colony.	1. Affirmed.
2. That the said Deed of hypothecation, as made by a Husband in favour of his Wife, *stante matrimonio*, is null and void so far as regards the interests in question in the cause.	2. Affirmed.
3. That the Plaintiffs are not entitled to rank either as preferent or as concurrent Creditors in respect of the value of the annuity provided to Mrs. *Paterson* by the Deed of Settlement, or under the Deed of hypothecation, in respect	*To stand thus.* 3. That the Plaintiffs are not entitled to rank *against the separate estate of Paterson* either as preferent or as concurrent Creditors in respect of the value of the Annuity provided to Mrs. *Paterson* by the Deed of Settlement, or under

Judgment.

of the sum of £13,000 mentioned in that Deed, or of any part thereof, until after the Creditors of *Paterson* shall have been paid their debts in full.

4. That the Plaintiffs are entitled to rank as concurrent Creditors for the £10,000 secured by the Settlement for the Children of the Marriage as a future and contingent debt—to wit, for the sum of £5,500—under the terms of the Insolvent Ordinance in that behalf.

5. And the said Court doth further adjudge and declare that the two sums of £4,000 and £3,000 remitted by *Paterson* to the Plaintiffs, as in the pleadings mentioned, were remitted by him in contemplation of sequestration, and with the intention of preferring the Plaintiffs over his other Creditors, and this Court doth decree that the Plaintiffs do pay over to the Defendants the said sum of £7,000, as part of *Paterson's* estate, to be distributed among his Creditors; and it is further ordered that no dividends be paid out by the Defendants to the Plaintiffs under their ranking in respect of the said sum of £10,000, until the said sum of £7,000 shall have been paid as hereinbefore decreed.

6. And the said Court doth further adjudge that the Plaintiffs do pay to the Defendants the costs of this action up to this time, and that the Defendants have liberty to apply to the Court, as they may be advised, in case the said sum of £7,000, shall not be paid to them as hereinbefore decreed

Proposed Judgment.

the Deed of hypothecation, in respect of the sum of £13,000 mentioned in that Deed, or of any part thereof, until after *all the separate* Creditors of *Paterson* shall have been paid their debts in full.

To stand thus.

4. That the Plaintiffs are entitled to rank *against the said separate Estate* as concurrent Creditors for the £10,000 secured by the Settlement for the Children of the Marriage as a future and contingent debt under the terms of the Insolvent Ordinance in that behalf.

5. Reversed.

To stand thus.

6. *The Plaintiffs are to pay the costs of the action in the Court below, other than the costs of the claim in reconvention, which the Defendants are to pay: each party paying his own costs of this appeal.*

Solicitors for the Appellants: *Linklaters, Hackwood, & Addison.*
Solicitors for the Respondents: *Vennings, Robins, & Venning.*

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AND

Jan. 27. THE BANK OF VICTORIA . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Principal and Agent—Negligence—Bill of Exchange—Presentment—Reasonable time—Acceptances—Cancellation of, by Drawee before delivery—Verdict—Nominal damages.

Post 699

The *Bank of Van Diemen's Land* were Indorsers of a Bill drawn by *G.* on *G. & Co.* at *Melbourne* at fifteen days after sight. The Bill was transmitted by the *Bank of Van Diemen's Land* to the *Bank of Victoria*, their Agents at *Melbourne*, for presentment. The *Bank of Victoria* received the Bill at one o'clock on Friday, and at 2 o'clock on the same day the Bill was presented by their Clerk to the Drawees, *G. & Co.*, for acceptance, and left with them for that purpose. On Saturday, the following day, an acceptance was written by one of the Firm of *G. & Co.* across the face of the Bill, and the Bill so accepted was handed to a Clerk to be delivered in the usual course of business, and at half-past 11 o'clock on that day a Clerk of the *Bank of Victoria* called upon the Drawees and asked for the Bill. He was told by the Clerk of the Drawees that the Bill had been mislaid, and requested to call again on Monday, which he agreed to do, as according to the custom in *Melbourne* business closed at 12 o'clock on Saturdays. On Monday the Clerk of the *Bank of Victoria* called again upon the Drawees, and was told that the Bill was ready to be delivered, but that in the absence of the Clerk who had charge of it, it could not then be got at, and he was requested to call on Tuesday. The Clerk called on that day and obtained the Bill, but the acceptance of the Drawees was cancelled on the face of the Bill, the Drawees having obtained information in the interval that the remittance was not likely to be forwarded by *G.* to meet the Bill. *G.* became insolvent, and the *Bank of Van Diemen's Land* having received nothing in respect of the Bill, brought an action against the *Bank of Victoria*, as their Agents, for negligence. The evidence did not show any uniform usage at *Melbourne* to present Bills the same day for acceptance. The custom to close at 12 o'clock on Saturdays was proved. The Judge put it to the jury, whether they thought that the *Bank of Victoria* was guilty of negligence, or a breach of duty, in not demanding that the Bill should be delivered up on Saturday accepted or unaccepted, and the jury answered that, strictly speaking, there was a neglect, but considering the respectability of the Drawees, and Saturday being a short day, the *Bank of Victoria* was excusable in leaving the Bill. The jury found for the Plaintiffs with nominal damages, and an application by the Plaintiffs to increase the damages to £3,000, the amount of the Bill,

* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), and SIR ROBERT NAPIER, BART.

was refused by the Supreme Court:—*Held*, by the Judicial Committee (affirming that judgment), that in the circumstances, and considering the position of the Drawees, there was no such negligence by the Defendants as Agents as to entitle the Plaintiffs to substantial damages.

Held, further, that although the Judge was wrong in directing the jury on what was a matter of law and not fact, yet that the substance of the answer of the jury was, that it being the ordinary course to leave a Bill for acceptance for twenty-four hours, and that the twenty-four hours run out on Saturday, but not before 12 o'clock, it was an excusable neglect to postpone the demand for an answer until the opening of the Drawee's Counting House on Monday.

The duty of an Agent is to be measured by considerations arising in particular cases; his duty is to obtain acceptance of the Bill, and it may be prudent, in circumstances, from the respectability of the Drawee, not to press for acceptance in such a way as to lead to a refusal, providing that proper steps are taken within the limit of time which will preserve the rights of his Principal against the Drawee.

THE appeal in this case was brought from a judgment of the Supreme Court of *Victoria* sitting in *banco*, discharging a rule *nisi* obtained by the Plaintiffs (the Appellants), calling upon the Defendants (the Respondents) to shew cause why the damages found for the Plaintiffs on the issues under the second, third fourth, and fifth counts of the declaration hereinafter mentioned should not be increased from one shilling to £3,000 on one of the counts, and in the alternative, to shew cause why the verdict found for the Defendants on the sixth count should not be set aside, and a verdict entered for the Plaintiffs for £3,000 pursuant to leave reserved at the trial.

The facts of the case were as follows:—

The Plaintiffs were Bankers, carrying on business in *Tasmania*, and having a branch at *Launceston*. The Defendants were also Bankers, carrying on business at *Melbourne*, in the Colony of *Victoria*. The Plaintiffs acted as Agents in *Tasmania* for the Defendants, and the Defendants acted as Agents in *Victoria* for the Plaintiffs by mutual agreement. On the 4th of February, 1867, a person of the name of *Gunn*, a Merchant at *Launceston*, discounted with the Plaintiffs a Bill of Exchange for £3,000, at fifteen days' sight, drawn at *Launceston* by *Gunn* on Messrs. *R. Goldsbrough & Co.*, of *Melbourne*, to the order of the Plaintiffs, for which Bill, *Gunn* received full value, less the amount of the discount. The Plaintiffs indorsed the Bill to the Defendants, and sent it to

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them at *Melbourne* by post, in order that the Defendants might, on behalf of the Plaintiffs, present it for acceptance and get it accepted by *R. Goldsbrough & Co.* This transaction was within the scope of the employment of the Defendants by the Plaintiffs as their Agents.

The Defendants received the Bill by the post on the morning of Friday, the 8th of February, 1867. They sent a Clerk with it to *R. Goldsbrough & Co.* the same day. He left it at *R. Goldsbrough & Co.*'s place of business about 2 P.M., and, according to established practice, called for it on the following morning, Saturday. At the time when he called, *Parker*, one of the Partners in *R. Goldsborough & Co.*, had accepted the Bill and handed it to his Cashier, *Horsfall*, to give to the Clerk of the Defendants when he should call. *Horsfall*, however, mislaid the Bill, and upon the Clerk of the Defendants calling for it, he said, "The Bill is mislaid; call on Monday." On Monday morning *Parker* saw in a Newspaper that *Gunn*, the Drawer of the Bill, had arrived at *Melbourne* on the previous evening from *Launceston*, and suspecting that something was amiss, went to his Counting-house about 9 o'clock, and gave directions to *Horsfall* not to part with the Bill without further instructions. The Clerk of the Defendants called again for the Bill about half-past 11, but was told that the person who had charge of it, or who had the key of the safe, was out, and left. Soon afterwards *Parker*, having seen *Gunn*, and learned that the goods against which the Bill was supposed to have been drawn had not been shipped, asked *Horsfall* for the Bill, and having got it, cancelled the acceptance he had written by striking his pen through it, and in that state it was given up to the Clerk of the Defendants when he called again for it on Tuesday, the 12th of February. The Defendants on the same day caused the Bill to be protested for non-acceptance, and afterwards, on the 2nd of March, presented it for payment, and on payment being refused caused it to be protested for non-payment, and then returned it to the Plaintiffs. *Gunn* shortly afterwards became Insolvent, and the Plaintiffs received nothing in respect of the Bill. The Plaintiffs claimed to be reimbursed the amount of the Bill, and ultimately the present action was brought.

The declaration contained six counts. It stated that the Plaintiffs and the Defendants carried on the business of Bankers in

Tasmania and *Victoria* respectively; that the Defendants had acted as the Agents of the Plaintiffs as such Bankers; that it was the course of dealing between the Plaintiffs and the Defendants, that the Plaintiffs should send to the Defendants as their Agents any unaccepted Bills of Exchange drawn on persons in *Victoria* of which they might be the holders in order that the Defendants as their Agents might get the same accepted for the benefit of the Plaintiffs, and might leave the same with the Drawees for a reasonable time in that behalf, or in case of non-acceptance give due notice to the Plaintiffs of such non-acceptance. It then averred, that on the 2nd of February, 1867, *Gunn* made his Bill of Exchange at *Launceston*, in *Tasmania*, and directed the same to *R. Goldsbrough & Co.* at *Melbourne*, and thereby required *R. Goldsbrough & Co.* to pay to the order of the Plaintiffs £3,000, at fifteen days' sight; that *Gunn* indorsed the Bill to the Plaintiffs, who indorsed it to the Defendants, in order that they might get it accepted for the benefit of the Plaintiffs, and that the Defendants received the Bill. The first count alleged, as a breach of duty by the Defendants, that they did not with due diligence present the Bill to *R. Goldsbrough & Co.* for acceptance. Each of the remaining five counts, after the averments above stated, went on to aver that the Defendants presented the Bill to *R. Goldsbrough & Co.* for acceptance, and the second count, after alleging that *R. Goldsbrough & Co.* then accepted the Bill, alleged by way of breach that the Defendants allowed the Bill so accepted to remain an unreasonable time in the hands of *R. Goldsbrough & Co.*, who, after they had accepted the Bill, cancelled the acceptance in the unreasonable time aforesaid. The third count alleged by way of breach that the Defendants left the Bill so presented as aforesaid with *R. Goldsbrough & Co.* for an unreasonable time in that behalf, and did not within a reasonable time after presentment demand and obtain from *R. Goldsbrough & Co.* the Bill, accepted or refused to be accepted. The fourth count, after averring that *R. Goldsbrough & Co.* signed their acceptance of the Bill, alleged by way of breach, that the Defendants allowed the Bill so signed to remain an unreasonable time in the hands of *R. Goldsbrough & Co.*, who, after they had so signed their acceptance, and before they delivered the Bill to the Defendants, cancelled their signature in the

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unreasonable time aforesaid. The fifth count, after alleging that *R. Goldsbrough & Co.* refused to accept the Bill, alleged by way of breach that the Defendants neglected to note the same for non-acceptance, or to give due notice of non-acceptance to the Plaintiffs. The sixth count, after averring that *R. Goldsbrough & Co.* accepted the Bill for the benefit of the Plaintiffs, and that the Defendants had notice thereof, alleged by way of breach that the Defendants wrongfully protested the Bill for non-acceptance, whereby the Plaintiffs lost all benefit of the Bill.

The Defendants by their pleas did not traverse any of the matters of inducement in the several counts, but pleaded, first, not guilty; secondly, to the second and sixth counts, that *R. Goldsbrough & Co.* did not accept the Bill; thirdly, to the fourth count, that *R. Goldsbrough & Co.* did not sign their acceptance; and fourthly, to the fifth count, that *R. Goldsbrough & Co.* did not refuse to accept the Bill.

The case was tried before Mr. Justice *Barry*, when evidence was given establishing the facts above stated, and evidence was also given by the Plaintiffs to establish, and by the Defendants to negative, the existence of a mercantile usage at *Melbourne*, requiring a Banker to whom Bills are sent to obtain acceptance to present them on the same day on which they arrived, provided they arrived early enough to allow that to be done. The learned Judge at the close of the case put five questions to the jury, which, with their answers, were as follows:—First: Are you satisfied that a mercantile usage has been established in evidence as existing in *Melbourne*, which required the *Bank of Victoria* to present the Bill of Exchange for acceptance on the same day it was received, February 8th, 1867?—Answer: Yes. Second: Do you think that the *Bank of Victoria* was guilty of negligence, or of a breach of duty, in not demanding that the Bill should be delivered upon Saturday, February the 9th, accepted or unaccepted?—Answer: Strictly speaking there was a neglect, but considering the respectability of the Firm, and Saturday being a short day, the Bank was excusable in leaving the Bill. Third: Do you think if the Bill had been so demanded on Saturday, it could have been obtained by the *Bank of Victoria*, accepted or unaccepted, and if so, which?—Answer: Yes, it might have been obtained accepted.

Fourth: Do you think the Bill could have been obtained by the *Bank of Victoria* on Monday, February 11th, uncancelled?—Answer: No. And, Fifth: Do you think that Saturday counts as a business day?—Answer: Yes. The jury assessed the damages at 1*s*.

Upon these findings the Judge directed the verdict to be entered for the Defendants on the issues raised as to the first and sixth counts, and for Plaintiffs on the issues raised as to the second third, fourth, and fifth counts, reserving leave to either party to move to enter the verdict upon any of the issues found against such party, and to the Plaintiffs to move to increase the damages on the issues found for the Plaintiffs from 1*s*. to £3,000, upon any issue finally entered for the Plaintiffs.

According to the leave reserved a rule *nisi* was granted by the Supreme Court to the Plaintiffs to increase the damages on the issues under the second, third, fourth and fifth counts, found for the Plaintiffs, to £3000 as substantial damages, or to enter the verdict with £3000 damages for the Plaintiffs on the issues relating to the sixth count.

The rule came on for argument on the 7th of September, 1869, and was discharged by the Court.

The following reasons for the judgment of the Court were transmitted to the Privy Council by the Chief Justice, Sir *William F. Stawell*:—

"The present rule was obtained to increase the damages on the second, third, fourth, and fifth counts, to £3,000, or to enter a verdict for the Plaintiffs on the last count, on the ground that they were proved to have been damnified by the wrongful protest by the Defendants of a Bill of Exchange accepted by the Drawees, and which they had no power to cancel. The Bill is payable a certain number of days after sight, presentment, therefore, was necessary in order to fix the time from which those days commence. No special duty is laid in the declaration, nothing beyond that usually observed by a Banker towards the Customer who transmits a negotiable security to be presented, and if dishonoured to take the necessary steps in proper time, but if paid, to receive the amount and deal with it according to instructions. The duty so laid is that which the evidence sustains. Although nothing beyond the usual routine was to be observed, it might have so

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happened, however, that had the Defendants pressed for an answer, or protested the Bill for non-acceptance on the Saturday, the Drawees, in ignorance of the true state of *Gunn's* affairs, and of the non-shipment of the goods against which the draft had been drawn, would have delivered it, and have thus to their own loss been compelled to pay the amount, as their acceptance once delivered would not have been dishonoured. The action is, in truth, brought to recover the amount from the Defendants which it is alleged might thus have been obtained from the Drawees. The duty apparently is of the ordinary kind, but the circumstances under which the Plaintiffs seek to recover from the Defendants are peculiar. It will facilitate the deciding on the question of negligence, or, as it may be really considered, breach of duty, if the case is divested of all extraneous matter, and thus the true nature of that duty ascertained. With this object, it may be regarded as the ordinary instance in which by the laches of the holder to present or give notice of dishonour in due time, the Drawer or previous indorser has been discharged. The Judicial Committee in *Ramchurn Mullick* v. *Luchmeechund Radakissen* (1), approved of the principle laid down in *Muilman* v. *D'Eguino* (2), and *Mellish* v. *Rawdon* (3), namely, that a Bill must be presented within a reasonable time, which is a mixed question of law and fact, that in determining that question not the interests of the Drawer only but those of the Holder must be taken into account, and that the Bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. In *Smith* v. *Mullett* (4), and *Grill* v. *Jeremy* (5), it was decided, that notice of dishonour need not be sent until the day after that on which the person himself received it. Lord *Tenterden*, in *Grill* v. *Jeremy*, observing, 'In these cases it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency in each particular case of a certain number of hours or minutes;' and Lord *Ellenborough*, in *Smith* v. *Mullett*, said, 'It is of great importance that there should be an established rule upon the subject. If you

(1) 9 Moore's P. C. Cases, 46.
(2) 2 H. Bla. 565.
(3) 9 Bing. 416.
(4) 2 Camp. 208.
(5) 1 Moo. & M. 61.

limit a man to a fractional part of a day, it will come to be a question of how swiftly the notice can be conveyed, you will have a race against time;' and in *Rickford* v. *Ridge* (1), it was held, that a Banker in *London* who receives a Cheque is not bound to present it for payment till the following day. 'Bankers would be kept in a continual fever if they were obliged to present a cheque the moment it is paid in.' In *Hare* v. *Henty* (2), the same principle was recognised as regards Country Bankers. Since some of these decisions were pronounced, clearing-houses have been established in *London* and other places, but where they have not been established, or in cases in which the practice arising from their having been established does not apply, the rule last-mentioned may now be regarded as settled, and applicable to Bills of Exchange as well as to Cheques. For, independently of authorities on the point, if any greater despatch were required in the one case than the other, a Cheque, which ought to be treated as payment, should be presented at least as soon to obtain that payment as a Bill to be accepted. At first sight the two chains of authorities to which we have referred appear somewhat opposed one to the other, but on examination we think they in no way conflict. Where the time required for the performance of the act cannot vary to any great extent, as in accepting or refusing to accept a Bill after it has been presented, the general convenience arising from uniformity has established a general usage by which the meaning in all such cases of reasonable diligence, according to the law-merchant, has been determined. So, also, in cases of giving notice of dishonour, or of presenting Cheques for payment, or Bills of Exchange for acceptance by Bankers in the same town, reasonable diligence has been used if the presentment is made or the notice of dishonour given on the day after receipt. Where, however, the time for the performance of the act may vary very considerably in different cases, where no general usage could well arise, and none has been established, or where several and conflicting interests must be considered, there the matter is necessarily a mixed question of law and fact. Both were so, but one by judicial decisions on general usage has become part of the law-merchant, and has, therefore, ceased to be a question of fact. The other has

(1) 2 Camp. 537. (2) 10 C. B. (N. S.) 65.

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not so become, and, therefore, still continues as it was, a subject involving both questions of law and matters of fact. We need not decide, whether evidence of a special local usage, in opposition to the law-merchant, is properly receivable; it has been received, but it fails in our opinion to establish, even within the limits of the City of *Melbourne*, a general, uniform, and reasonable usage to present Bills of Exchange for acceptance on the same day they have been received. Statements of Bankers that they would send Foreign Bills out for acceptance on the day they received them if they could, but if it was a heavy Mail, on the next day, prove no such usage, in our opinion. On the contrary, they shew the danger of hastily accepting those statements as proof, for if such usage were once established the size of the Mail would afford no excuse for non-compliance. It can readily be understood why, for the sake of themselves or their constituents, Bankers may be desirous to obtain the acceptance of any drafts as early as possible, but there is a clear distinction between such a desire and proof of any reasonable, uniform, and generally recognised usage, a usage, too, which it is said has in a particular locality altered the law-merchant. The verdict for the Plaintiffs awarding only nominal damages, when closely examined, supports the view that a uniform usage has not been proved. It was left to the jury to give nominal or substantial damages as they found the Defendants had or had not been guilty of negligence in not obtaining an answer on Saturday. If it was necessary to present on Friday an answer ought to have been obtained on Saturday, and the omission to do so could not be cured by any reliance on the mercantile position of the Drawees. As the Bill might have been obtained accepted on the Saturday, and if then obtained, would have been met at maturity, the Plaintiffs were entitled to substantial damages. The answers to some of the questions are, no doubt, opposed to this view of the verdict. Continuing the consideration of the subject, we think, that if notice of dishonour had been given on Monday, the Defendants would not have been liable had the action been brought for not having given that notice in due time. A Bank is allowed a day to present a Cheque or give notice of dishonour, and, by analogy, we think that under ordinary circumstances the Defendants had until Saturday to present, and until Monday to obtain an accept-

ance or refusal to accept, and if not accepted give notice of dishonour. The probability that pressure or threat of protesting the Bill if not accepted would have led to its being delivered accepted on Saturday, in no way affects the question of negligence, for it formed no part of the Defendants duty to press that the draft should be accepted, or that the acceptance if signed, but not delivered, should be delivered to them. The Defendants were, in our opinion, simply to present and obtain a distinct definite answer one way or the other. We make these observations because during the argument the case was put for the Plaintiffs as if the Defendants were guilty of negligence, merely because this draft was not obtained on the 9th accepted in the same way as one of the other drafts on the same Drawees was obtained by the holder thereof. If the legal obligation be correctly stated, as we believe it to be, it cannot be received as sound reasoning that because another person, the holder of another draft, procured the acceptance of that draft a day before he was entitled to insist on its delivery, the omission to act as he did affords any evidence of negligence on the part of the Defendants. The Plaintiffs, however, without admitting that due diligence would have been used if there had been presentment on Saturday, and answer on Monday, and notice then given, contended that the Defendants, whether rightly or wrongly, having presented on Friday were bound to obtain an answer on Saturday. It was not competent for the Bank, it was said, consistently with its duty to the Plaintiffs, having once presented, to make any other division of the interval between the receipt of the draft and the time when notice of dishonour should have been given. Although the Defendants had to perform two acts, present and obtain an answer, and separate times are allotted for the performance of each, yet both combined constitute only one duty, namely, obtain an answer, and if required give notice with due promptness. It does not, however, necessarily follow that the time can be divided to suit the Defendants' views, and this, in our opinion, is the gist of the present case. It appears that without in any way consulting the convenience of the Bank, or, so far as could then be supposed lessening the prospect of the Drawees accepting, the period allowed by law to present was voluntarily, on the Defendants' part, abridged, and the draft presented earlier

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than was required. It cannot, we think, be fairly said, apart from the special circumstances which subsequently transpired, that thus leaving a draft with the Drawees longer than the law required was likely to prevent its ultimate acceptance. The time now allowed is so allowed in order to afford the Drawee full opportunity for removing any scruples, and satisfying himself as to whether he should accept or not. Had that time been abridged, or a longer time taken by the Holder to present, the case would have been very different. Does then this voluntary abridging of the time for the first of the two acts deprive the Defendants of any portion of the full time allowed for both—of the period in fact within which he might, but for this abridgment, have given notice of dishonour? There is no express decision on the point. *Hare* v. *Henty* (1) is not, in our opinion, a direct authority, as was contended for the Defendants. Still, considering it in all its parts, it appears to recognise the principle that if there are two courses open to the holder of a Cheque as regards presenting it for payment he may pursue either, so long as the time allowed by law for that presentment is not exceeded. The Cheque in that case forwarded by the night post of Friday, the day it was received, to the clearing-house, might as well have been sent direct to *Lewes* for presentment, but the celerity in thus despatching it did not determine the case against the then Defendant, still less was the question held to be a matter of fact for the jury. And in the present case we think the circumstance of having presented the draft on Friday did not compel the Defendants to obtain an answer on Saturday, or preclude them from so dividing the interval as to allow less time for presentment, and thus inconvenience only the *Bank of Victoria*, and more time for acceptance, and thus convenience the Drawees. In fact the Plaintiffs' argument would almost lead to this conclusion, that the Defendants were guilty of negligence because the Plaintiffs did not receive notice of dishonour sooner than the law required, for had the Bill been protested on Saturday, a Mail made up as it might have been on that night, and notice of dishonour forwarded by that Mail to the Plaintiffs in *Tasmania*, they would thus have received it earlier than they were entitled, and yet the Defendants, it is urged, must be held to have discharged their duty negligently,

(1) 10 C. B. (N. S.) 65. 7 Jur. N. S. 523,

because notice was not sent thus earlier than was necessary. On the 11th the Bill could not, according to the evidence, have been obtained accepted. Had it been protested, and notice sent on that day, due diligence would have, in our opinion, as we have already said, been used. Notice, however, was not sent till Tuesday, and though it was received as soon as if it had been forwarded on Monday we think due diligence was not used. We cannot speculate as to results. The fact remains that whatever the effect might have been, even if due diligence had been used, it has not, and the verdict therefore must stand, though the damages ought to remain only nominal as the Drawer was insolvent. We think, too, the division of the time in this case is a question for the Court and not for the jury; if they were to determine, whether the time could not thus have been divided, they would in effect decide whether a Bill should be presented on the day it was received or the day after, a question upon which, in the absence of proof of a special usage on the subject, it is not for them to pronounce. According to our view the verdict for the Plaintiffs with nominal damages on the fifth count should stand. No cross rule has been taken out as regards the second, third, or fourth, and the Plaintiffs have addressed their arguments to an increase of damages on the fifth. We need not, therefore, specially consider any of the preceding counts. It only remains to dispose of the cause of action in the last count. Much stress was laid during the argument on the Plaintiffs' right to have a verdict on that count with substantial damages, the acceptance of the firm having been in fact written on the draft on Saturday, and the answer then given to the Defendants' Clerk who called for it, to the effect that 'Bill was mislaid, call again on Monday,' and on Monday that 'Bill was ready to be delivered up, but the person who had charge of it was out,' amounted, it was contended, to evidence of a complete acceptance, or if it did not, the conversation between the Bank Clerk and a member of the firm of *Goldsborough & Co.* on Tuesday, the 12th was an estoppel which precluded the Drawees from saying the draft had not been accepted, and from cancelling the acceptance, so that to protest the draft afterwards was negligence on the Defendants' part. In *Cox* v. *Troy* (1), it was determined, that even if the

(1) 5 B. & Ald. 474.

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Drawee has written his name on the Bill, with the intention to accept, he is at liberty to cancel the acceptance before the Bill is delivered. To this summary of the decision, Mr. Justice *Byles* has added in his work on Bills, 'or at least before the fact of acceptance is communicated to the holder.' Now, the Plaintiffs have, in our opinion, failed to establish facts which support either the ruling or the comment. There is no proof whatever of actual delivery. The answer on Saturday affords no evidence that the Bill had been accepted, and there is no proof of any authority on the part of the Clerk to return the answer he did on the morning of the 11th. The fact of directions having been issued by the Drawees, his employers, on that morning not to deliver up the Bill, negatives any presumption that could fairly be raised to the contrary. Nor does the conversation referred to amount, in our opinion, to any admission that the draft had been accepted. The Clerk said he went to procure the Drawees' acceptance. If already accepted this was unnecessary. The observation, 'It was reported accepted, I consider it was accepted, and beg of you to accept it,' corroborates this view, namely, that the Bank never supposed the draft had been fully accepted. The answer 'I won't accept,' contains, in our opinion, no admission that having been accepted it had been ordered to be delivered. It meets the question put, 'And I beg of you to accept,' which we think was all that was then required of the person addressed. We are of opinion that the draft, though accepted in writing, never was delivered as an acceptance, nor admitted to have been so delivered, nor was anything which could be regarded as equivalent to a delivery having taken place communicated by a duly authorized Agent. The rule obtained will be discharged."

The appeal was from this judgment, discharging the rule.

Mr. *J. Brown*, Q.C., and Mr. *A. Wills*, for the Appellants:—

We contend that the judgment of the Court below is wrong; that a verdict ought to have been entered for the Appellants. The jury found that the Defendants might have got the Bill accepted on the Saturday, and that it was negligence in not having done so; if so the damages ought to have been substantial, and not merely nominal, as the Appellants have lost £3,000. Upon the

evidence, it is clear that *Goldsbrough & Co.* were bound by their acceptance, and could not cancel it; and if that were so, the Defendants were wrong in protesting the Bill for non-acceptance, and the verdict ought to have been for the Appellants on the issues relating to the sixth count. It is not very easy to collect the precise grounds for the decision of the Court below. The Court appear to treat the case as that of an ordinary Indorsee of a Bill of Exchange drawn but not accepted, and to lay down as matter of Law that the Defendants had two days within which to obtain an answer; one in which to present the Bill, another during which it should be left for acceptance with the Drawees, so as to give themselves two days in all for the combined operations of presenting and getting an answer. No objection could arise upon the argument of the rule as to the admissibility of the evidence of mercantile usage, and yet the Court dismiss the finding of the jury upon that point with the observation that, in their opinion, the evidence failed to make it out. Such reasoning is unsatisfactory, as there is no analogy between the case of a mere Indorsee of a Bill and an Agent employed to make presentment, the indorsement to whom is subsidiary to the employment, and does not alter the responsibilities of the Agent as Agent. It was not a proper question for the jury, what was the duty of the Agent under such circumstances; that is a question of Law, not of fact, and the finding of the jury on that point must be accepted as conclusive. The jury, however, having found the duty, and the breach of duty, the damages can be nothing else than the amount of the Bill, which but for such breach of duty would have been paid. The words appended by the jury to their answer to the second question put by the Judge do not qualify it, but merely add their reasons, which are not good ones, for thinking the breach of duty venial under the circumstances; they cannot affect the right of the Appellants to substantial damages. Even if the analogy between the present case and an ordinary Indorsee could hold, the Indorsee is bound to obtain an answer the day after he leaves the Bill with the Drawee, whether he has presented the Bill on or before the last day to which he is entitled to wait before presenting the Bill. There has been unreasonable delay and negligence: *Mellish* v. *Rawdon* (1).

(1) 9 Bing. 416.

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If the presentation of the Bill for acceptance is not made within a reasonable time the Drawers are discharged: *Ramchurn Mullick* v. *Luchmeechund Radakissen* (1). The proper time for presenting a Bill is laid down in *Story* on Bills, §§ 325, 326 [4th Ed.], and the respectability of *Goldsbrough & Co.*, or the fact of Saturday being a short day, was no excuse. Again, the answer given to the Bank Clerk on the Saturday was abundant evidence of a communication to the Defendants of the fact that the Bill was then accepted, and if the Respondents had insisted on an answer and had been told that the Bill was accepted, that would have prevented *R. Goldsbrough & Co.* from afterwards cancelling their acceptance: *Cox* v. *Troy* (2); *Byles* on Bills, p. 195 [10th Ed.]; the verdict, therefore, ought to have been entered for the Appellants on the sixth count, and it follows, as of course, that the damages must be £3,000: *Ralli* v. *Dennistoun* (3).

Sir *John Karslake*, Q.C., and Mr. *Watkin Williams*, for the Respondents:—

There was no laches or negligence on the part of the Respondents, either in presenting the Bill for acceptance, or in endeavouring to obtain the acceptance, and the Appellants are not entitled to substantial damages by what occurred. At all events they are not entitled to enter a verdict for £3,000. If the finding of the jury as to the amount of damages was erroneous or unsatisfactory, the proper amount of damages must still be a question for the consideration of a jury. The Bill was delivered to the Drawees in proper time, and it cannot be urged with success, that there was neglect in not getting it accepted on Saturday, the business hours in *Melbourne* closing at twelve o'clock on that day, as it was the duty of the Respondent to wait twenty-four-hours. If the Bill was not left that time the Drawer loses his right of action for not accepting, and the Appellants, as Indorsees, in consequence their right against the Drawer, and the Respondents, as Agents, would have been liable to an action for negligence. It must also be borne in mind that it was a Foreign Bill. The cancellation of the acceptance was within the power of *R. Goldsbrough & Co.*: *Byles* on Bills, p. 195 [10th Ed.]; *Cox* v. *Troy* (4). There it was held, that if a Defendant, having

(1) 9 Moore's P. C. Cases, 46.
(2) 5 B. & Ald. 474.
(3) 6 Ex. 483.
(4) 5 B. & Ald. 474.

written his acceptance with the intention of accepting a Bill, afterwards changed his mind, and before it was communicated to the holder, or the Bill delivered back to him, he obliterates his acceptance, he is not bound as Acceptor. So in *Bentinck* v. *Dorrien* (1), cited in that case, Mr. Justice *Lawrence* says: "When the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is in the hands of the Drawee; and where he obliterates it before any communication to the holder."

LORD CAIRNS :—

In this case, although some criticism might be bestowed upon the form which the proceedings have taken, their Lordships entertain no doubt as to what ought to be their opinion upon the substance of the question which has been raised. That question is, whether the Supreme Court of *Victoria* was right in refusing a rule that had been obtained by the Plaintiffs in the action to increase the damages assessed upon certain counts from one shilling, nominal damages, to £3,000?

The action was brought by the *Bank of Van Diemen's Land*, who were the holders of a Bill of Exchange for £3,000, drawn by one *Gunn* upon the firm of *Goldsbrough & Co.*, against the *Bank of Victoria*, to whom they had sent the Bill as their Agents for presentation for acceptance and for payment at the proper time, and the first Bank, the Principals, complained of the second Bank, the Agents, that they had negligently performed their duty with regard to obtaining the acceptance of the Bill. The manner in which they alleged the duty and the breach of it in their declaration was this. Passing over the first count, and taking the second, it averred, "that the Defendants being the Agents of the Plaintiffs as in the first count mentioned, and having received from the Plaintiffs the Bill therein mentioned indorsed as aforesaid for the benefit of the Plaintiffs, presented the said Bill to the said *Richard Goldsbrough & Co.* for acceptance, for the benefit of the Plaintiffs, who then accepted the same, yet the Defendants allowed the said Bill so accepted to remain an unreasonable time in the hands of the said

(1) 6 East, 201.

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Richard Goldsbrough & Co., who, after they had accepted the said Bill, cancelled and revoked the said acceptance in the unreasonable time aforesaid." And again, in the fourth count it is alleged, that "the Defendants allowed the said Bill so signed to remain an unreasonable time in the hands of the said *Richard Goldsbrough & Co.*, who, after they had so signed their acceptance of the said Bill as aforesaid, and before they delivered the said Bill to the Defendants, cancelled and revoked their said signature in the unreasonable time aforesaid."

Now, the first question which their Lordships have to consider is, what is the meaning of the term "unreasonable time," as between persons circumstanced as the Plaintiffs and the Defendants were? The Defendants were the Agents of the Plaintiffs. The law does not lay down as an absolute rule any time which is reasonable or unreasonable, as between persons standing in this relation, for the execution by the Agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a Bill of this kind from Principal to Agent is to obtain the acceptance and the payment of the Bill, or, if it is not accepted, to guard the rights of the Principal against the Drawer in case recourse is to be had to the Drawer, their Lordships are of opinion, that the duty of the Agent must be measured by those considerations, and that the duty of the Agent is to obtain acceptance of the Bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his Principal against the Drawer. Now, bearing in mind that this is, therefore, the gist of the action—to try whether this duty was or was not performed by the Defendants, we turn to what are the facts of the case.

It appears that the Bill was received by the Defendants, the *Bank of Victoria*, on Friday, February the 8th, 1867, at one o'clock in the afternoon. They presented it on the same day at two o'clock in the afternoon for acceptance, and left it in the usual way with the Drawees for consideration. On Saturday, at about half-past eleven o'clock, the Clerk of the Defendants called upon the Drawees, and asked for the Bill. He was told by the Clerk of the Drawees that the Bill had been mislaid, and he was requested

to call again on Monday, which he agreed to do. The hours of business on Saturday terminated half an hour afterwards, namely, at twelve o'clock. On Monday, the 11th of February, at half-past eleven, he again called. He was told that the Bill was ready to be given out, but that, from the absence of the person who had charge of it, or of the key of the safe where it was, he could not get it at that time, and he was requested to call on Tuesday. On Tuesday he called, and obtained the Bill in a condition to which I will afterwards refer.

It is not disputed that, as between the Monday, when the second call was made, and the Tuesday, there was delay; and if during that interval any damage had accrued to the Plaintiffs, there might have been a right of action, and a right to obtain indemnity for the damage that had so accrued. Upon that there was no dispute. Neither was there any dispute upon this, that the Bill was presented for acceptance to the Drawees in due and proper time; in fact, within one hour after it was received. The whole question, therefore, arises upon the events of the Saturday, the 9th of February. Was, or was it not, a justifiable act in the Clerk of the Defendants when he called upon the Saturday at about half-past eleven, and when he was told that the Bill had been mislaid, and was requested to call again on Monday, to assent to that request, and, without demanding a distinct and positive answer at that time or re-delivery of the Bill, to agree to call again on the Monday?

Now, without looking to what happened to the Bill in this particular case during the interval that it remained in the hands of *Goldsbrough & Co.*, to which I will afterwards refer, and without looking to the particular finding of the jury, to which also I will afterwards refer, their Lordships would be prepared to hold that, it being part of the ordinary custom of Merchants to leave a Bill for acceptance twenty-four hours with the person upon whom it is drawn, and it not being proved that in this case there was any different usage in *Melbourne*, but, on the contrary, there being strong evidence that the same usage prevailed there which prevails in other places, and the business hours closing at *Melbourne* at twelve o'clock upon the Saturday, before the twenty-four hours had expired—if the case were disembarrassed of any difficulty, as

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regards the finding of the jury, there had been here no breach of duty, and that it would have been a harsh and unnecessary proceeding to have insisted upon a distinct answer on the part of the Drawees or a re-delivery of the Bill at half-past eleven on the Saturday; and that whether the Clerk called on the Saturday at half-past eleven, and was then told that the Bill was mislaid, and was asked to call again on the Monday, and did so, or whether he had not called on the Saturday at all, but made his first call, asking for the Bill, on the Monday morning, there would not in either case have been any failure of duty on the part of the Agents, who had the duty cast upon them of obtaining the acceptance of the Bill.

In this particular case a somewhat singular circumstance had happened to the Bill during the time that it lay with *Goldsbrough & Co.* It appears that *Goldsbrough & Co.*, on the Friday—the same day on which the Bill had been left—wrote their name across the face of the Bill in the form of an acceptance. Of this, however, the Clerk of the Respondents, when he called for the Bill on Saturday, knew nothing. It appears that on the Saturday it was an accurate statement to make that the Bill had been mislaid. It had been mislaid, and the Clerk could not put his hands upon it. It appears that before the Monday arrived circumstances had arisen, which it is unnecessary to detail, which led *Goldsbrough & Co.* to doubt whether the remittances, which were to have been made against this Bill, would actually be coming forward, and on the Monday morning, before the Clerk called for the Bill, *Goldsbrough & Co.* cancelled their acceptance written across the Bill, and when upon the Tuesday it was delivered out, it was delivered out with the acceptance cancelled. There appears to be no reason to doubt, and in point of fact it is one of the matters which the jury have found, that if the Bill could have been obtained by the *Bank of Victoria* on the Saturday it would have been obtained accepted; that is to say, if the Clerk could have got it when he called on the Saturday, it would have been given to him in the form in which it then stood with the name *Goldsbrough & Co.* written across as Acceptors; and, of course, if it had been so given, it would have been paid at maturity. Their Lordships, however, are of opinion, that this, which was an accident of this particular case, cannot

alter the general law upon the subject of the duty of the Agent. If the Agent was not failing in the performance of his duty when he agreed to adjourn his visit for the purpose of taking up the Bill from the Saturday to the Monday, the accident in this particular case, that the Bill had had an acceptance written across it on the Saturday, and, if then delivered up at all, would have been delivered up in that form, cannot alter the duty of the Agent, or make that in this case a failure in duty which if the Bill had not had this acceptance written across it would not have been a failure of duty on the part of the Agent.

It is necessary now to look at the course which the action has taken with reference to the findings of the jury. The allegations in the declaration being of the character which I have mentioned, and the pleas having taken issues, as to the second and last counts by traversing the acceptance of the bill, as to the fourth count by traversing the signature of the acceptance as in that count alleged, and generally there being a plea of course, of not guilty, the case was tried before Mr. Justice *Barry* and a jury, and these questions were put by the learned Judge to the jury. The first question was: "Are you satisfied that a mercantile usage has been established in evidence as existing in *Melbourne*, which required the *Bank of Victoria* to present the Bill of Exchange for acceptance on the same day it was received, February 8th, 1867?"—and to that the jury answer "Yes." Upon that no question arises. The Bill was presented for acceptance upon that day, and that answer we may pass over as immaterial. I pass over the second and take the third question:—"Do you think that if the Bill had been so demanded on Saturday, it could have been obtained by the *Bank of Victoria* accepted or unaccepted; and if so, which?" To which the jury answer "Yes, it might have been obtained accepted." Upon that also there appears to be no doubt, and the evidence justifies that conclusion of the jury. The fourth question is—"Do you think the Bill could have been obtained by the *Bank of Victoria* on Monday, February 11th, uncancelled?' To which the jury answer "No." On that also there is no doubt. Then the fifth question is—"Do you think that Saturday counts as a business day?" And the jury answer "Yes." That also does not appear

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to be in dispute in any matter in which the question is, whether Saturday is a *dies non* or not.

Their Lordships now come to the second question, which was this:—"Do you think that the *Bank of Victoria* was guilty of negligence or of a breach of duty in not demanding that the Bill should be delivered up on Saturday, February the 9th, accepted or unaccepted?" Their Lordships cannot but regret the form of that question, which appears to submit to the jury what is rather a matter of law, in place of directing their attention to the questions of fact, upon which properly a jury should express their opinion. No doubt the form of the question put to the jury ought to have been, "Do you think that the *Bank of Victoria* left the Bill an unreasonable length of time with the Drawees?" However, the question being in the form that has been read, the jury answer:—"Strictly speaking, there was a neglect; but, considering the respectability of the Firm and Saturday being a short day, the Bank was excusable in leaving the Bill." The answer of the jury is in a somewhat singular form, and perhaps if they had been pressed by the learned Judge so to do, they might have put their answer in a form which would have been more apposite to the question which they were asked to answer. They have given, however, an answer which, in their Lordships' opinion, substantially comes to this. They say, paraphrasing their reply, that in strictness there was what they term a neglect, but that it was in their opinion an excusable neglect, for two reasons which they assign. If the meaning of the term "excusable neglect" is considered, it must mean this,—that an excuse valid in law, existed for that which, *primâ facie*, and if the excuse did not exist, would in law be a neglect. We must, however, look at the grounds which are given by the jury for saying that there was an excuse for neglect, for if those reasons are not relevant to the case, or are plainly insufficient, their Lordships are not prepared to say that the Court in *banc* are bound to accept them. The first reason is the respectability of the Firm. That, as has been pointed out by the learned Judges below, is certainly not a sufficient reason, because the respectability of the Firm would not be a justification for leaving the Bill for a period longer than otherwise would be reasonable; the danger in such cases being not so much from

want of respectability in the Drawees, as from some accident happening to the Drawer of the Bill. The second ground, however, is, that Saturday was a short day, by which obviously the jury meant that Saturday was a day in which business hours terminated at twelve o'clock.

Now, their Lordships looking to this answer, and comparing it with the evidence in the case, have no doubt that what the jury meant to express when they used these words, was this,—that it being the ordinary course to leave a Bill for acceptance for twenty-four hours, and those twenty-four hours running out upon Saturday not before two o'clock, which would be two hours after business had ceased, it was a natural and justifiable act to postpone the demand for an answer until the re-opening of the Counting-house on Monday morning, and that the Clerk was justified in assenting to the request that without waiting any longer on Saturday, he would return on Monday, and then apply for the Bill. Their Lordships understand that to be the meaning of the jury, and they assent to the view the jury took, that a fair and proper excuse was shewn to them for what otherwise would have been a neglect on the part of the Bank, who were the Agents to the Plaintiffs.

That being the view of their Lordships, it is obvious that a very grave question, to say the least of it, might have been raised, whether the Defendants in the action were not entitled on their part to have obtained a rule, and to have had that rule made absolute, for entering the verdict for the Defendants upon those issues on which it was entered for the Plaintiffs. That might have been a very grave question, and their Lordships are disposed to think that such a rule might have been successful. It may, however, be that the neglect between the Monday and the Tuesday would in point of form entitle the Plaintiffs to retain the verdict upon those issues with one shilling nominal damages, but whether that be so or not the Defendants in the action were satisfied not to make an application upon this score to the Court, and they are not in a position to say that any more favourable result should accrue to them with regard to the mode of entering the verdict; but, on the other hand, their Lordships consider that they are entitled to say, that the verdict should not be increased, and they

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are of opinion, that the decision of the Court below upon that head was right.

Their Lordships will, therefore, humbly recommend to Her Majesty that the present appeal should be dismissed, and dismissed with costs.

Solicitors for the Appellants: *Parker, Leo, & Haddocks.*
Solicitors for the Respondents: *Paine & Hammond.*

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HENRY AYERS AND OTHERS . . . . . APPELLANTS;

AND

THE SOUTH AUSTRALIAN BANKING COMPANY . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australian Act, No. 4, *of* 1855-6—*Construction of—Security for Loan—Banking Company—Charter—Principal and Agent—Preferential lien on Wool—Trover.*

JCP 49
Gl 252
10 QBD 377

The *Australian Act,* No. 4, of 1855-6, entitled "An Act to give a preferable lien on Wool, from season to season, and to make Mortgages on Sheep, Cattle, and Horses valid without delivery to the Mortgagee," enables a Proprietor of Sheep to make a valid pledge of the Wool of his next clip, although no possession is given; and Trover is maintainable by a Mortgagee to whom a preferential lien has been so given under that Act; the Mortgagee, whether Agent or Principal, actually in possession being to be deemed the Proprietor of the Sheep, for the purpose of giving such preferential lien, within the meaning of the Act.

A Banking Company incorporated by Charter, which contained a clause declaring that it should not be lawful for the Company to advance money on the security of merchandize, advanced money on the faith of receiving as security a preferential lien on the Wool of an ensuing clip to be shorn from the Sheep of the party in whose favour the advances were made, but who was not in the actual possession of the Sheep, though a part Owner of the Sheep and the Agent of the other Owners for whose benefit the advances had been made:—

Held, in an action of Trover by the Company on such agreement giving them a preferable lien, that the same was maintainable, and that the Banking Company were entitled to recover for the value of the Wool on such preferential lien.

THIS was an appeal from an Order making a rule absolute of the Supreme Court of *South Australia,* discharging, with costs, a rule

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

nisi calling upon the Respondents to shew cause why the verdict obtained by them should not be set aside, and instead thereof a nonsuit entered, or that the amount of damages and interest be reduced, pursuant to leave reserved at the trial in an action of Trover to recover the value of a quantity of Wool, in which the Respondents were Plaintiffs, and the Appellants, Defendants. The action was brought by the Respondents against the Appellants for the wrongful conversion of Wool on which the Respondents claimed a preferable lien under an agreement, dated the 23rd of August, 1866, and which Wool the Appellants, who were Trustees or Assignees of the Creditors of the Firm of *Philip Levi & Co.*, had appropriated as part of the assets of that Firm. The Appellants pleaded, first, not guilty; and, secondly, that the Wool was not the Respondents', as alleged. Issue was joined on those pleas.

The action was tried before the Chief Justice of the Supreme Court.

According to the Chief Justice's notes, the Respondents on the trial put in evidence the agreement dated the 23rd of August, 1866, which was admitted to be signed by *Philip Levi*, and assented to by the Firm of *Philip Levi & Co.* This preferable lien for advances made to *Philip Levi* by the Respondents was made in the form prescribed by, and was registered according to, the provisions of the Act of the Provincial Legislature 1855–6, No. 4, entitled "An Act to give a preferable lien on Wool, from season to season, and to make Mortgages on Sheep, Cattle, and Horses valid without delivery to the Mortgagee." Witnesses were examined to shew the power of *Philip Levi*, as a Partner and Agent, to pledge the Wool for his Firm; the effect of whose evidence is stated in their Lordships' judgment.

It was admitted that the Bills mentioned in the agreement, creating a preferable lien, were given for the sum of £38,000, secured by the agreement, and it appeared that such preferable lien was given in accordance with the terms of a Letter, dated the 26th of December, 1865, from the Manager in *London* of the Respondents' Company, to their Assistant Inspector at *Adelaide*.

The first two documents put in by the Appellants consisted of

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two Indentures of Assignment, one dated the 17th of September, 1866, executed by *Philip Levi*, *Edmund Levi* and *Alfred Watts*, three of the Partners in *Adelaide* of the Firm of *Philip Levi & Co.*, and the other, dated the 23rd of February, 1867, executed in the name of *Frederick Levi*, the *London* partner of that Firm, under a Power of Attorney. These Deeds purported to be made under the provisions in the sixth division of the *Insolvent Act*, No. 16, 1860, entitled "An Act to amend and consolidate the Laws relating to Insolvent Debtors." The latter Indenture also confirmed an Indenture, dated the 31st of January, 1868, which was also put in by the Appellants. Under the Indentures of the 17th of September, 1866, and the 23rd of February, 1867, or one of them, the Appellants, as Trustees for the Creditors of the insolvent Firm of *Philip Levi & Co.*, obtained possession of the Wool in question, and insisted upon their right to convert the same to their own use notwithstanding the Respondents' preferable lien.

It also appeared that the Appellants, after the commencement of the action, obtained an Order of the Provincial Court of Insolvency, dated the 24th of September, 1868, for the sale of the Wool in question, upon the alleged footing of the same being in the order and disposition of *Philip Levi* at the time when he executed the Indenture of the 17th of September, 1866. The Appellants also put in evidence another preferable lien, dated the 19th of July, 1866, given by Mr. *Philip Levi* to the Respondents and to *John Coleman Dixon*, as the Inspector of the Bank, upon the Wool in question, with a view to raise an objection as to the right of the Respondents to recover in the action, as the right of action was vested in *Dixon*, and not in the Respondents. The Appellants also put in the Respondents' Bank Charters of the 3rd of September, 1847, and the 5th of July, 1866. The object of the Appellants in putting in the Bank Charters was to question the preferable lien on the ground, that by the Charter of 1847 it was not lawful for the Bank to lend or advance money on the security of Lands, Houses, or other real property, or of Ships or merchandise. The last document put in on the part of the Appellants was an agreement, dated the 26th of May, 1866, the Appellants to set up this document as a first charge on the Wool in question in favour of the Firm of *Willans, Overbury, & Co.*

On the trial the Appellants submitted, that the Judge ought to nonsuit the Respondents, or direct a verdict for less than the net value of the Wool, but the Judge directed a verdict for the Respondents for £16,280. 14*s.* 9*d.*, and interest at 10 per cent. from the 1st of July, 1867, reserving leave to the Appellants to move to enter a nonsuit, or to reduce the amount of damages and interest, if the Court should be of opinion on the whole case, that the Respondents were not entitled to recover; or that the Appellants were entitled to make any deduction from the net amount realised in *England* on account of expenses of shearing and sending to port; or that the Respondents were only entitled to Wool in respect of *Philip Levi's* interest in the runs; or that the jury ought not to have been directed to find for interest; or that interest should have been calculated at a less amount. On the part of the Respondents, leave was applied for to move the Court to abandon the claim in respect of the share of other persons than *Philip Levi* in the Runs if the Court should be against the Respondents on that point; and the Judge reserved leave to the Respondents to amend by adding the name of *Dixon*, if the Court should be of opinion, that the preferable lien personally made to him was valid, and disentitled the Respondents to recover (*Dixon* consenting to be joined as Plaintiff), and a verdict was thereupon entered according to the above directions.

In pursuance of the leave thus given the Appellants moved to set aside the verdict, and to enter a nonsuit, on the following grounds: first, that *Philip Levi* was not the Proprietor of the Wool pledged to the Defendants within the meaning of the *South Australia Preferable Lien Act*, and had only a partnership interest in such Wool, and the security was thereby rendered void *in toto* or *pro tanto;* second, that *Philip Levi* had previously pledged the Wool, first to Messrs. *Willans, Overbury, & Co.*, secondly to *Dixon*, and was not, therefore, a Proprietor within the meaning of the *Preferable Lien Act;* third, that the advances were not made or given to *Philip Levi*, but to the firm of *Philip Levi & Co.;* fourth, that the advances were not made on condition of receiving this particular security; fifth, that the consideration was not truly stated in the preferable lien, as it was not delivery of the Bills in question, but was an agreement to deliver the Bills; sixth, that

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the preferable lien was not properly registered, being only by memorial, and that the whole instrument should have been registered; seventh, that the memorial was insufficient, as it did not shew the consideration, the nature of the instrument, or sufficiently describe the Lienors' interest or the subject matter; eighth, that the Wool was in the order and disposition of *Philip Levi;* ninth, that the preferable lien was fraudulent and void under the 90th and 82nd sections of the *Insolvent Act;* tenth, that the preferable lien was an act of insolvency; eleventh, that the transaction was prohibited by the Bank Charter; twelfth, that the operation of the Deed of assignment rendered void the preferable lien; thirteenth, that the Defendants were entitled to deduct expenses of shearing and bringing the Wool to the port of shipment; and, lastly, that the Plaintiffs ought not to be allowed interest, but that, if allowed interest, it ought to be calculated at a lower rate than 10 per cent.

A rule to shew cause was granted. The case was argued before the Supreme Court, constituted of the Chief Justice, Sir *R. D. Hanson,* and the Justices *Wearing* and *Gwynne,* and judgment was delivered by the Court on the 7th of January, 1869, the Chief Justice and Mr. Justice *Wearing* being of opinion, that the rule *nisi* should be discharged, and Mr. Justice *Gwynne* that it should be made absolute. Mr. Justice *Gwynne* in his judgment held, that the Respondents never had possession of the Wool in question, and never had any property in it, so that, whatever might be their remedy, it was not by an action of Trover, and on this ground he thought that the rule ought to be made absolute. The Chief Justice and Mr. Justice *Wearing* concurred in over-ruling this objection to the form of the action, and also in holding, that there were no sufficient grounds in other respects for disturbing the verdict, and accordingly the rule *nisi* was discharged, and the present appeal was brought from an Order of the Supreme Court, dated the 7th of January, 1869, discharging the rule *nisi.*

Mr. *Manisty,* Q.C., and Mr. *C. Hutton,* for the Appellants:—

There was no evidence of any valid instrument or agreement giving the Respondents a preferable lien upon the Wools of the

next ensuing clip of the Firm of *Philip Levi & Co.* Neither the instrument of the 23rd of August, 1866, nor that of the 19th of July, 1866, purported to give the Respondents a preferable lien on any Wool except as affected the interest of *Philip Levi* only, nor was the consideration therein mentioned truly stated. *Philip Levi* had only a partial interest in the Wool in question; and the sum for which the verdict was entered included the value of Wool which did not belong to the Firm of *Philip Levi & Co.*, or to any member of it. Damages were assessed upon an erroneous principle, even as regarded the Wool which belonged to the Firm. Again, the Wool in question was in the order and disposition of the Firm of *Philip Levi & Co.*, as reputed Owners, with the consent of the true Owners, and the Appellants, as their Trustees or Assignees, are entitled to the proceeds thereof. The execution of the instruments of the 19th of July and 23rd of August, 1866, the same not being valid and effectual to give a preferable lien, were acts of insolvency, and void as against the Appellants. The Respondents could only recover for what they legally took under the instrument of the 23rd of August, 1866, namely, what it purported to give, and *Philip Levi* had property in, which would not pass the property of the Firm, only his interest. He had no power as Agent to bind the Firm: *Cherry and M'Dougall* v. *The Colonial Bank of Australasia* (1).

Another objection is, that the advance upon the security of Wool was contrary to the terms of the Respondents' Charter, which prohibited advances on merchandise, and whatever may be the rights of others, the transaction being in violation of the Bank Charter, the Respondents have no title to enforce it, as it was *ultrà vires*. *The National Bank of Australasia* v. *Cherry* (2) is an authority to shew that the powers of the Bank Charter must be strictly followed to entitle the Respondents to the preferential lien they claim.

Sir *R. Palmer*, Q.C., Sir *George Honyman*, Q.C., and Mr. *G. A. Marten*, for the Respondents, were not called on to address their Lordships.

(1) *Ante*, p. 24. (2) *Ante*, p. 299.

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THE LORD JUSTICE MELLISH:—

This is an action of Trover brought for the conversion of a large quantity of Wool. The Defendants are the Trustees of the Firm of *Philip Levi & Co.* in *South Australia*, who became insolvent according to the laws of that Country; and the action was brought by the *South Australian Banking Company* to enforce what is called a preferential lien, which they had obtained, as they alleged, on the Wool of a large number of Sheep, by an instrument made in accordance with the *South Australian Act*, No. 4, of 1855–6, on the 23rd of August, 1866. Several objections were argued; but it is probably better first to allude to an objection which was taken in the Court below, though it was not seriously argued here, namely, that an action of Trover would not lie for this Wool, even if there was a good preferential lien given in accordance with the *South Australian Act*. One of the learned Judges in the Court below was of opinion that an action of Trover could not be maintained. Now, as regards that, their Lordships are clearly of opinion, that an action of Trover may be maintained by a person to whom a valid preferential lien has been given under this Act.

The real effect of the Act appears to be this, that it enables a proprietor of Sheep to make a valid pledge of the Wool of his next clip, although no possession is given. Ordinarily by the Common Law, although of course a mortgage may be given of chattels as well as of land without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods. The effect of this Act simply appears to be this, that it enables a pledge of Wool to be given without a delivery of possession; and it enacts that "the possession of such Wool by the said Proprietor shall be, to all intents and purposes in the law, the possession of the person or persons making such purchase or advance." Therefore, the person who has made the advance is to be deemed to be in possession. That being so, there appears no reason whatever why he should not be able to maintain an action of Trover, because there is no doubt at all, that if goods are delivered by way of pawn or pledge to a person who makes advances on them, and then somebody else takes the goods out of his possession and converts them, he can maintain an action of Trover. And the true effect of this Act appears to be, that the lender is for the pur-

poses of the Act to be deemed to be in possession, and to have the same rights in point of law as if he was in possession, and amongst those rights, is the right of maintaining an action of Trover if anybody wrongfully converts the Wool.

Now, the next question, and the more material question, which was argued on behalf of the Appellants, is that *Philip Levi*, the person who signed his name to the instrument of the 23rd of August, 1866, was not the Proprietor of the whole of these Sheep, and that, therefore, all that could pass under this instrument was the interest, whatever it might be, that *Philip Levi* happened to have in the Sheep. Now, for the purpose of considering the validity of that objection, it is necessary, in the first place, to consider who may give this preferential lien, according to the true construction of the Act. No doubt the words used in the first section are, "Proprietor of Sheep:" "That in all cases where any person shall make any *bonâ fide* advance of money or goods, or give any valid Promissory note or Bill to any Proprietor of Sheep, on condition of receiving in payment, or as security only for such money, goods, Promissory note or Bill, as the case may be, the wool of the then next ensuing clip of such Proprietor," etc. And then, no doubt, it seems to be assumed, that the Proprietor is the person in possession of the Wool, because it says afterwards, in the clause already referred to, "That the possession of such Wool by the said Proprietor shall be, to all intents and purposes, in the law, the possession of the person or persons making such purchase or advance." But then, under the eighth section, which is the section which makes it a misdemeanour for persons, after having granted such a lien, wrongfully to deal with the Wool, it enacts: "That any Grantor of any such preferable lien on Wool, or of any mortgage of Sheep, Cattle, or Horses, or of their increase and progeny, under this Act, whether such Grantor shall be Principal or Agent, who shall afterwards, by the sale or delivery of the wool," etc., is to be guilty of a misdemeanour.

Now, their Lordships are of opinion that, according to the true construction of the Act, any person who is in possession of the Sheep, either as Principal or Agent, and has authority from the real Owner to deal with the Sheep and create such a preferable lien, ought to be deemed to be the Proprietor of the Sheep within

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the meaning of the Act. Independently of this Act such an instrument as this would at the most have only created an equitable charge, and such a charge would have been invalid as against anybody who might have purchased the Sheep or the Wool after it was clipped, for valuable consideration, without notice of the preferential lien. The main object of the Act seems to have been, to enable a valid legal security to be given of the Wool of Sheep before it was clipped, so that persons might with safety make advances on the security of such Wool; and there seems no reason why the Agent who is in possession of the property, and who has power from the Owner to deal with it, who could clearly, by authority from the Owner, create a valid equitable lien, should not also have power to create the legal security which it is intended by the Act to effect.

Now, let us see what the interest of *Philip Levi* was in these Sheep. He was a Partner in the Firm of *Philip Levi & Co.*, and one of the other Partners had previously agreed with the *South Australian Bank*, in consideration of their giving them large credit for £60,000 for the year 1866, and allowing them to draw upon them to that amount, that the Firm would give them a preferable lien over their Sheep. There is the evidence of one Witness, namely, *Percy Wells*. He says, "The interest of *Philip Levi* in the Station was defined by the Books; he had the sole management of the Station." It is true another Witness also says, "We," speaking of the Firm, "had the entire management of the Stations." The evidence of those two Witnesses is not really inconsistent. No doubt *Philip Levi* was acting on behalf of the Firm, and the Firm were the persons who had the real interest. But, still, on the evidence of *Wells*, there appears no reason to doubt that *Philip Levi* was the person who had the actual management of the Stations—that he was, in fact, the managing Owner, so to speak, of these Stations; and that, apparently, was the reason (for there does not appear to be any other reason) why this instrument was made in his name.

On the face of the instrument it appears that the consideration was to *Philip Levi & Co.*, because it is said to be "in consideration of £38,000 *bonâ fide* value, for which I admit to have received from the *South Australian Banking Company* in the drafts (each draft being in triplicate of the Manager in *Adelaide* of the said *South*

Australian Banking Company in *London*), and payable to *Philip Levi & Co.*, or order." Therefore, here it appears that in consideration of an advance made by the Bank to *Philip Levi & Co.*, *Philip Levi*, who is one of the Partners, and the managing Partner in this transaction, for the purpose of carrying out a contract previously made by the Firm, and with the assent of all the other members of the Firm, signs this particular instrument. If the Act makes it illegal, that might be another matter, but independently of that, nobody surely can doubt that this is an instrument which binds the Firm; that it would have given, wholly independently of the Act, a perfectly good equitable charge on the Wool of the Sheep of the Firm; and it may well be argued, that if a Firm agree that one of the members of the Firm, who is the actual Manager of the particular property which is in question, shall have power to transfer that property for the purpose of giving a charge and security for money advanced to the Firm, and then he does it, the result of that transaction, *quà* the Firm, is, that he is made the Owner for the purpose of executing that charge. He is in the actual possession, no doubt, as Manager; he is a joint Owner, and the other Owners agree and consent that for a consideration advanced to them, he shall have power to make the charge.

That being so, their Lordships do not see that there is any such restriction in this Act as to prevent them from holding that that which would give a perfectly good equitable charge independently of the Act, should not, in accordance with the Act, make a perfectly legal charge; and, therefore, their Lordships are of opinion, that *Philip Levi* may fairly be considered as Proprietor. But even if that were not so, *Philip Levi & Co.* themselves having assented to this charge being made, it is plain that they never could set up, as against the *South Australian Bank*, who have made advances to them on the security of this instrument, which was executed with their assent, that it was not valid, or that any fact which was necessary to make it valid, was not true. Though their Lordships do not think that it is necessary, yet if it was necessary that *Philip Levi* should be the absolute Proprietor, in order that this instrument should be good, their Lordships would be of opinion, that *Philip Levi & Co.* would be estopped from saying that the Sheep and Wool were not the Sheep and the Wool of *Philip Levi* at

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the time when he executed this instrument; and they are also clearly of opinion, that the Plaintiffs, being Trustees under an assignment from *Philip Levi & Co.*, which is not executed for any consideration given at the time, but is merely an assignment in trust for the purpose of distributing their property among their Creditors, the Trustees under such an assignment have no greater right than *Philip Levi & Co.* themselves would have; and, therefore, cannot set up that *Philip Levi* had not power to execute this instrument, and cannot set up that he was not a Proprietor of the Sheep at the time the instrument was executed.

But then it was said on the evidence of *Wells*, that even the Firm were not the real Proprietors of these Sheep, and on cross-examination he stated, that a variety of persons had a variety of interest in these Sheep. But then the same Witness says, all the Stations were in debt to the Firm; and it is perfectly consistent with all the evidence, that the whole of these Sheep were mortgaged to the Firm for advances made to them, and that the Firm were perfectly entitled as between them and all the other real Proprietors of the Sheep to clip the Wool and sell the Wool, and apply the proceeds in payment of the debts due from those persons to the Firm. There is evidence, in fact, that that is so, because we find in the Letters it is stated, that the Wool was to be treated as the estate of the Firm, and it is an undoubted fact that they did sell it, and they applied the proceeds for the purposes of the Trustees and the insolvent estate; and it does not appear that any one of those persons ever in the smallest degree objected to it. It is perfectly impossible to say that that is not, under the circumstances of this case, absolutely conclusive evidence that the Firm were the Owners of these Sheep so far as to enable them to give this preferable lien on the Wool, which is all that is necessary for the purposes of this case, and that, therefore, the Trustees, who are bound by what binds *Philip Levi & Co.*, having applied this Wool to their own purposes, there seems no reason why the Bank cannot bring this action.

Another objection was taken by Mr. *Manisty* on the terms of the Charter—the clause in the Charter which says, it shall not be lawful for the Bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the

effect of that clause in the Charter which may be of very great importance, but which also being of great difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the Charter, but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a Conveyance or instrument which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the Plaintiffs. Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take Bills of Exchange with the Bills of Lading attached. If it is to be said that the property in the goods mentioned in the Bill of Lading does not pass to them, then any Purchaser to whom they might sell the goods under the Bill of Lading would get no title, and the original Owner who had received the full proceeds of the goods, or a large advance upon them, might say, "Oh, the property never passed to the *South Australian Bank*, and, therefore, it never passed to you." Mr. *Manisty* admitted that he could find no authority for the proposition, that any violation of such a condition of a Charter would prevent the property in goods passing to the person to whom an instrument otherwise valid professed to pass it, and their Lordships are of opinion, that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of Trover being maintained if there is a wrongful conversion.

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On the whole, therefore, their Lordships are of opinion, that the judgment of the Court below was right, and they will humbly advise Her Majesty that this appeal should be dismissed, with costs.

Solicitors for the Appellants: *Gray, Johnston, & Mounsey.*
Solicitors for the Respondents: *Thomas & Hollams.*

J. C.* 1871 *Jan.* 31.

THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF VICTORIA . . . . } . APPELLANT;

AND

HUGH GLASS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Statute, 18 & 19 *Vict. c.* 55—*Colonial Act* 20*th Vict. No.* 1—*Victoria Legislative Assembly—Breach of privilege—Power to commit for contempt—General Warrant—Practice—Special leave to appeal—Reversal—Costs.*

By the Constitution Act for the Colony of *Victoria* (The Imperial Statute, 18 & 19 Vict. c. 55, s. 35, and the Colonial Act, 20th Vict., No. 1) power is given to the Legislative Assembly of *Victoria* to commit by a general Warrant for contempt and breach of privilege of that Assembly.

G. was declared by the House of Assembly of *Victoria* to have committed a contempt and breach of privilege, and, under the Speaker's Warrant, which was in general terms, without specifying any specific offence, *G.* was committed to Gaol. *G.* was afterwards brought up by *Habeas Corpus* and discharged out of custody by the Chief Justice of the Supreme Court in the Colony, on the ground that the above Constitution Statute and Colonial Act did not confer upon the Legislative Assembly the same powers, privileges, and immunities as are possessed by the House of Commons. On appeal, *held* by the Judicial Committee:—

First, that the Statute and Act gave to the Legislative Assembly the same powers and privileges as the House of Commons had at the time of the passing of the 18 & 19 Vict. c. 55, of committing for contempt;

Secondly, that, incident to those powers and privileges, there was vested in

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* *Present*:—LORD CAIRNS, SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), and SIR JOSEPH NAPIER, BART.

the Legislative Assembly the right of judging for itself what constituted a contempt, and of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt and breach of privilege, by a general Warrant, without setting forth the specific grounds of such commitment; and

Thirdly, that as *G.* had been guilty of a contempt and breach of the privilege of the Legislative Assembly, and had been duly committed, therefore, the Supreme Court had no power to discharge him out of custody.

Special leave to appeal granted on the ground, that the question raised was one of public interest, involving the constitutional rights of a Colonial Legislative Assembly. On reversing the Order of the Court below no costs were given, as the appeal was only allowed to decide the abstract question.

IN this case a special appeal was allowed, first, from an Order made by Sir *William Foster Stawell,* the Chief Justice of the Colony of *Victoria,* ordering the Respondent to be discharged on a Writ of *Habeas Corpus;* and, secondly, from a rule of the Supreme Court, discharging a rule *nisi,* which had been obtained by the Appellant, to set aside the above Order of the Chief Justice.

The appeal arose under these circumstances:—

The Appellant, Sir *Francis Murphy,* was the Speaker of the Legislative Assembly of the Colony.

On the 11th of March, 1869, the Legislative Assembly appointed a Select Committee, with power to send for persons and papers, to inquire into and report upon certain charges which had been made public relating to the conduct and character of certain Members of the Legislative Assembly. The Respondent was, among other Witnesses, examined before such Committee.

On the 6th of April, 1869, the Committee reported to the Legislative Assembly that an Association, formed for the purpose of promoting the interests of certain holders of land, had adopted as one of its modes of action the bribing and undue influencing of Members of the Legislature, and that the Respondent and one *John Quarterman* being Members of such Association, and cognisant of this mode of action, had actively aided in the administration of the funds of the Association.

On the 27th of April, 1869, the Legislative Assembly resolved, that the Respondent and *Quarterman* had actively aided in the administration of the funds of the Association, employed in the bribing and undue influencing of Members of the Legislative Assembly;

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that in the opinion of the House they were guilty of a contempt and breach of the privileges of the House; that they should be taken into custody of the Sergeant-at-Arms, in order that they might be brought to the Bar of the House; and that the Speaker should issue his Warrants accordingly.

The Appellant, as Speaker, issued his Warrants, which were in general terms, and did not allege any specific offence, under which the Respondent and *Quarterman* were on the next day arrested and brought to the Bar of the Legislative Assembly, when the Speaker informed the Respondent that he had been found guilty of a contempt and breach of the privileges of the Assembly, and the Respondent read a written statement in mitigation of punishment.

On the 29th of April, 1869, the Legislative Assembly resolved that the Respondent and *Quarterman* having been guilty of a contempt and breach of the privileges of the House, should be for their offence committed to Her Majesty's Gaol at *Melbourne*, and that the Speaker should issue Warrants accordingly. The Appellant, as the Speaker, thereupon issued his Warrants under his hand, reciting the above resolution of the Legislative Assembly, and requiring the Sergeant-at-Arms to deliver the Respondent and *Quarterman* to the Keeper of the *Melbourne* gaol, and such Keeper to receive and keep them during the pleasure of the Legislative Assembly, and accordingly the Respondent, with *Quarterman*, was removed from the Bar of the Assembly and detained in the custody of the Sergeant-at-Arms until the 30th of that month, on which day they were taken to *Melbourne* Gaol, and detained there until the Respondent was discharged under the writ of *Habeas Corpus* hereinafter mentioned.

While the Respondent was a Prisoner in *Melbourne* Gaol, the Appellant issued another Warrant, similar to that lastly hereinbefore mentioned, except that it contained no reference to *Quarterman*.

On the 30th of April, 1869, the Respondent obtained a Writ of *Habeas Corpus*, directed to the Keeper of the Gaol at *Melbourne*, to which the Keeper returned, as the causes of his detaining the Respondent, that he had received the two Warrants before mentioned.

The Chief Justice, assisted by two other Judges, heard the arguments of Counsel for and against the discharge of the Respondent from imprisonment, and on the 1st of May, 1869, gave judgment, ordering his discharge.

On the 6th of May, 1869, the Legislative Assembly appointed a Select Committee to inquire into the proceedings relating to the discharge of the Respondent, and subsequently to receiving the the report of such Committee, resolved that the House should not in deference to the decision of the Chief Justice abandon the power of committing by means of a Warrant in general terms. And also that the necessary steps should be forthwith taken for subjecting the decision of the Chief Justice to the review of the Privy Council. It was considered that to enable the Appellant to appeal to Her Majesty in Council, it was necessary to obtain a judgment of the Supreme Court, and accordingly a rule *nisi* was obtained to set aside the Order of the Chief Justice. On the rule coming on for argument before the full Court on the 3rd of July, 1869, a preliminary objection was taken, that the Court had no jurisdiction to rescind the Order of a Judge made on the return of a Writ of *Habeas Corpus*, and the Court, adopting this view, discharged the rule.

The following reasons for judgment were transmitted to *England* pursuant to the rule of the Judicial Committee:

"The extent of the powers conferred by the Act, No. 20 Vict., No. 1, on the Legislative Council and Legislative Assembly, forms the sole question for consideration in this case. For the commitment it is alleged that these bodies have been empowered, not merely to commit for contempt, but also to commit by a Warrant in general terms. And against it, that every such Warrant should either so describe the contempt as to shew that it was of a kind for which the Commons House of Parliament might have committed in 1855, or should at least contain some general averment to that effect. The other objections to the Warrant need not be considered, though they may be regarded as supporting, indirectly, the principal ground. By the Act referred to, the Council and Assembly enjoy, it is alleged, the privileges, immunities, and powers of the House of Commons at the time the Statute, 18 & 19 Vict. c. 55, was passed, so far as they are not inconsistent with that enactment,

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The words 'at the time, &c.,' may not possess any special significance, for the Statute confers the same privileges as the House of Commons then held; and such a clause, even in the absence of these words, would, of course, refer to the time at which the Statute spoke, namely, its passing. Nor for the purposes of this case is it necessary to controvert the proposition that the House of Commons could have committed for any contempt, and by a Warrant in general terms, which was not examinable in any Court of Law. The question remains, whether the Act, 20 Vict., No. 1, conferred this authority. The plenary powers to legislate for *Victoria*, given to its Parliament by section 1 of the Bill in the schedule to this Statute are restricted as regards the subject of 'privilege' by the proviso to the 35th section; it is so treated, also, by the Act, 20 Vict., No. 1. These sections taken together in effect contain full authority, save that no measure declaring the privileges of Parliament can confer larger than those possessed by the House of Commons in 1855. As the powers of that body are not to be exceeded, a standard, limiting the extent of the powers to be given, has necessarily been erected—that of 1855—and the Act declaring the privileges has so described them. Whether, on a comparison being instituted between the actual exercise of their respective powers, the limit so assigned may or may not, in practice, amount to a real restriction, is not the question. It is clear that, to the extent referred to, the Parliament of *Victoria* does not possess unlimited powers of legislation. The necessity for imposing, or rather the imposition of a limit, excludes by fair intendment the supposition that, by the general words used, an authority was granted which would necessarily have had the effect of neutralising the operation of that limit. The Act affects the liberty of the subject, and must, therefore, be construed strictly. Even assuming, for the purposes of argument, that the right to issue a Warrant, as contended, could have been acquired by the insertion of special and express terms, yet the general words of description by reference are insufficient to negative the presumption that arises against that right having been given. If the powers of Legislation on this subject are limited, the enactment passed by virtue of them, and the Warrant issued under that enactment, should each shew that the limit has not been exceeded. There must be some mode of

deciding the question of excess or no excess. A Court, itself created by an Act of Parliament, does not, in entertaining such a question, review the Acts of that Parliament in the ordinary sense of those words; but if, as in this case, there is no other Tribunal before which in the first instance the question can be brought, to hold that this Court, although so created, cannot consider the question, is in effect to say that no Court can; and that in the case of limited powers no means exist of testing the validity of their exercise, or determining the proper construction of an Act of Parliament; although the ordinary Tribunals for such a purpose have been established, and the consideration of such a subject forms one of the most important functions of a Court of law. The 2nd section of the Act, 20 Vict., No. 1, by which printed copies of the Journals are made *primâ facie* evidence of the privileges of the House of Assembly, may present some anomaly in treating as matters of fact questions which involve points of law only; but howsoever that anomaly may be removed, the section apparently confirms the view that such privileges were to be called in question in some way or other. To confine its operation to proceedings before Committees of each House would be scarcely consistent with the comprehensive language employed; and yet if a Warrant in general terms affords a sufficient answer to arrest and imprisonment, it is difficult to discover how such evidence would be of any practical utility. The recent decision in *Dill* v. *Murphy* (1) shews how readily an unexceptionable Warrant may be framed, even in the case of a commitment for contempt *extra muros*. The argument urged on the hearing of this case embraced many topics to which allusion was not made in delivering judgment; the conclusion arrived at was not affected by them, and the great majority, if not the whole, have been dealt with in the judgment of this Court, pronounced in the case of *Dill* v. *Murphy*, and the later one of *Stevenson and others* v. *The Queen*."

In consequence of this decision the Appellant, the Speaker of the Legislative Assembly, presented a petition to Her Majesty in Council for special leave to appeal from the Order of the 1st of May, 1869, discharging the Respondent on the Writ of *Habeas Corpus*, and also from the rule of the Supreme Court discharging

(1) 1 Moore's P. C. Cases (N. S.) 487.

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the rule *nisi*. The petition set forth the facts above stated, and submitted that, under the provisions of the 35th section of the Constitution Act, contained in Schedule 1 to the Imperial Statute, 18 & 19 Vict. c. 55, and by the Colonial Act, 20 Vict., No. 1, and the privileges, immunities, and powers thereby conferred on the Legislative Assembly of *Victoria*, the Warrants of the Petitioner, as such Speaker, were valid, and the Order of the Chief Justice discharging *Glass* from custody, and also the rule discharging the rule *nisi*, were erroneous.

J. C.* 1869 — *Nov.* 26.

Sir *R. Palmer*, Q.C., and Mr. *J. Dennistoun Wood*, appeared for the Petitioner.

Their Lordships were of opinion that, in the circumstances, as an important question relating to the privileges of the Legislative Assembly at *Victoria* was raised, it was a fit case to recommend the allowance of a special appeal.

By an Order in Council, dated the 11th of December, 1869, leave to appeal from the Order of the Chief Justice discharging the Respondent, and the Order discharging the rule *nisi*, was granted.

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The appeal now came on for hearing.

Sir *R. Palmer*, Q.C., and Mr. *Manisty*, Q.C. (Mr. *J. Dennistoun Wood*, and Mr. *Watkin Williams*, with them), for the Appellant:—

The Legislative Assembly of *Victoria* holds and enjoys such and the like privileges, immunities, and powers as at the time of the passing of the Imperial Statute, 18 & 19 Vict. c. 55 (1), were held

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† *Present*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

(1) The Constitution Act of *Victoria* is set out in the Schedule to the Statute 18 & 19 Vict. c. 55, the 35th section is as follows:—"It shall be lawful for the Legislature of *Victoria*, by any Act or Acts, to define the privileges, immunities, and powers, to be held, enjoyed, and exercised, by the Council and Assembly, and by the Members thereof respectively: Provided, that no such privileges, immunities, or powers shall exceed those now held, enjoyed, and exercised by the Commons House of Parliament, or the Members thereof."

This Statute was proclaimed in

and enjoyed by the House of Commons, and it cannot be successfully controverted, that the power to commit and imprison persons guilty of a breach of the privileges of the House of Commons is not one of the powers and privileges which at the time of the passing of that Statute and of the local Act, 20 Vict., No. 1, were held and enjoyed by that House. That has been held in *Dill* v. *Murphy* (1) to be one of the privileges of the House of Assembly at *Victoria*. It was also at the time of the passing of the Statute one of the privileges, immunities, and powers of the House of Commons to order the commitment to Prison of persons adjudged by the House to be guilty of a contempt and breach of its privileges, by a general Warrant, without assigning the particular grounds of such adjudication: *Stockdale* v. *Hansard* (2); *May*, on the Law, Privileges, and Usages of Parliament, p. 172 [6th Ed.]; *Case of the Sheriff of*

Victoria on the 23rd of November, 1855, and, in accordance with an enactment therein contained, the Statute and the Constitution Act, which had previously been assented to by Her Majesty in Council, took effect in the Colony from the day of such proclamation.

The Act, 20th Vict., No. 1, of the Legislature of *Victoria*, so far as it is material to the question, is as follows: "Whereas by an Act intituled 'An Act to enable Her Majesty to assent to a Bill as amended of the Legislative Council of *Victoria*,' it was amongst other things enacted, that there should be established in *Victoria*, instead of the Legislative Council then subsisting, one Legislative Council and one Legislative Assembly, to be severally constituted as therein provided: And further, that it shall be lawful for the Legislature of *Victoria*, by any Act or Acts, to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Council, or Assembly, and by the Members thereof respectively: Provided, that no such privileges, immunities, or powers, should exceed those then held, enjoyed, and exercised by the Commons House of Parliament, or the Members thereof: And whereas it is expedient to exercise the power given by the said recited Act as hereinafter mentioned, be it therefore enacted by, &c., as follows:—

"The Legislative Council and Legislative Assembly of *Victoria* respectively, and the Committees and Members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers, as, and the privileges, immunities, and powers of the said Council and Assembly respectively, and of the Committees and Members thereof respectively, are hereby defined to be the same as at the time of the passing of the said recited Act were held, enjoyed, and exercised by the Commons House of Parliament of *Great Britain* and *Ireland*, and by the Committees and Members thereof, so far as the same are not inconsistent with the said recited Act, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, Statute, or otherwise."

(1) 1 Moore's P. C. Cases (N. S.) 487.

(2) 9 Ad. & E. 1.

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Middlesex (1), and the cases there cited; *Burdett* v. *Abbot* (2); *Howard* v. *Gosset* (3); and such privilege and power was by the Imperial Statute vested in the Legislative Assembly of *Victoria*. Such a Warrant, if issued by the Speaker of the House of Commons, would have been a sufficient answer to a Writ of *Habeas Corpus*.

As the Respondent had been guilty of a contempt and breach of the privileges of the Legislative Assembly, the Chief Justice had no power to discharge him, as he had been committed by that body for having been guilty of such contempt. The Supreme Court ought to have taken judicial notice of the Statute, 18 & 19 Vict. c. 55, and Act, 20 Vict., No. 1, conferring the privileges on the House of Assembly, and their privileges and power to commit for contempt.

Sir *John Karslake*, Q.C., and Mr. *A. F. Watson*, for the Respondents:—

This case raises an important constitutional question affecting Colonial Legislative Assemblies, in general and in particular: whether the Legislative Assembly of *Victoria* has, under the Imperial *Constitutional Act*, 18 & 19 Vict. c. 55, s. 35, and the Colonial Act, 20 Vict., No. 1, the same powers as the House of Commons possess to commit for contempt under a general Warrant. Unless it has been expressly given, which, we submit, it has not, by the above Imperial Statute, the House of Assembly in issuing the Warrants in question have exceeded their power. The privilege and power conferred by the Imperial Act is the power to commit for contempt merely; the power of judging what contempt is, without appeal, as exercised by the House of Commons, is not transferred to, or possessed by, the Colony of *Victoria*. The privileges and powers of a Colonial House of Assembly are defined in *Kielley* v. *Carson* (4). It was there held, that such a body does not possess, as a legal incident, the power of arrest, with a view of adjudicating on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local Legislature; as the House of Commons only possesses that power by the *lex et consuetudo Parliamenti*; and further, that the Crown cannot by its Prerogative confer the power of committing for contempt. That case overruled *Beaumont* v.

(1) 11 Ad. & E. 273.
(2) 14 East, 137.
(3) 10 Q. B. 359.
(4) 4 Moore's P. C. Cases, 63.

Barrett (1) with respect to the powers of the House of Assembly of *Jamaica* to commit for contempt. The same principles were applied in the case of *Fenton* v. *Hampton* (2); and in *Doyle* v. *Falconer* (3) this Tribunal held, adopting those cases, that the Legislative Assembly of *Dominica* did not possess the power of punishing a contempt, though committed in its presence, and by one of its Members, as such authority did not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti*, which is inherent in the two Houses of Parliament, or to a Court of Justice, which is a Court of Record; but not to Colonial Houses of Assembly, which possess no judicial functions. The Legislative Assembly of *Victoria* is clearly not a Court of Record like the House of Commons. [LORD CAIRNS:—Is it not rather a strong expression to say that the House of Commons is a Court of Record?] *May*, on the Law, Privileges, and Usages of Parliament, p. 101 [6th Ed.], assumes that the House of Commons is a Court of Record. But as the Legislative Assembly is not a Court of Record, the Imperial Parliament had no power by Statute to confer such authority. The Legislative Assembly, therefore, could not commit for contempt by a Warrant, general in its terms, like a Court of Record could do: *Ex parte Jose Luis Fernandez* (4); *McDermott* v. *The Judges of British Guiana* (5). The contempt ought to appear on the face of the Warrant. Here the Warrant did not sufficiently express the specific act of contempt, and consequently the Respondent was properly discharged from custody by the Supreme Court. An Order of a Court of Record, committing for contempt, is examinable on appeal: *In re Pollard* (6). The cases of *Burdett* v. *Abbott* (7); *The Case of the Sheriff of Middlesex* (8); *Howard* v. *Gosset* (9), referred to by the Appellant, all relate to the procedure of the House of Commons.

Their Lordships' judgment was delivered by

LORD CAIRNS:—

Their Lordships have heard this case very fully argued, not from any doubt which, at any period of the argument, they enter-

(1) 1 Moore's P. C. Cases, 59.
(2) 11 Moore's P. C. Cases, 347.
(3) Law Rep. 1 P. C. 328.
(4) 10 C. B. (N. S.) 3.
(5) Law Rep. 2 P. C. 341.
(6) Ibid. 106.
(7) 14 East, 150.
(8) 11 Ad. & E. 273.
(9) 10 Q. B. 359.

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tained as to the advice which they should humbly tender to Her Majesty upon this appeal, but from the respect which they feel for the Court from which the appeal proceeds.

On the 1st of May, 1869, the Respondent, *Glass*, was in the custody of the Keeper of Her Majesty's Gaol at *Melbourne*, and a Writ of *Habeas Corpus* was obtained in the usual way, for the purpose of submitting to the Court the grounds upon which he was so detained. The return to that Writ set out a Warrant issued by the Appellant, as Speaker of the Legislative Assembly, to the Serjeant-at-Arms of the Assembly, and to the Keeper of Her Majesty's Gaol at *Melbourne*. That Writ commenced by stating, that the Legislative Assembly of *Victoria* had, on the 27th of April, 1869, resolved that the Respondent was guilty of a contempt and breach of the privileges of the Legislative Assembly; and it proceeded to direct the Serjeant-at-Arms to take the Respondent into custody, to deliver him to the Keeper of the Gaol, and the Keeper of the Gaol in the usual way to detain him. On that return being made, and on reading that return and the Writ, the Respondent was discharged from custody. The full Court (a rule *nisi* to set aside this Order having been obtained) refused to discharge the Order; and it is from those decisions that the appeal comes.

The Warrant upon the face of it states, that the Legislative Assembly had resolved that the Respondent was guilty of a contempt and a breach of privilege of the Legislative Assembly. No doubt can be entertained, and it was not disputed in argument, that if a Warrant in this form had been issued by the Speaker of the House of Commons in this Country, it would have been a sufficient answer to a Writ of *Habeas Corpus*, and that such a Warrant would be perfectly good and sufficient, stating simply that a contempt had been committed, and that the Prisoner was to be taken under the Warrant in consequence of that contempt. The question then arises, is a Warrant in a similar form in the Colony sufficient?

By the Imperial Statute, the 18 & 19 Vict. c. 55, s. 35, power was given to Her Majesty to assent to a Bill of the Legislature of *Victoria* to establish a constitution in and for the Colony of *Victoria;* and the assent of the Crown was accordingly given to such a Bill. The Bill is contained in the schedule to the Imperial

Act, and the 35th section in the Bill, which has the force of an Act of Parliament, runs thus: "It shall be lawful for the Legislature of *Victoria* by any Act or Acts to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Council and Assembly, and by the Members thereof respectively: provided that no such privileges, immunities, or powers shall exceed those now held, enjoyed, and exercised by the Commons House of Parliament or the Members thereof." Their Lordships pause at this section, for the purpose of saying that they do not entertain any doubt that the word "respectively" is to be read distributively with reference to all that goes before, and is to apply to the Council and the Assembly, and the Members of the Council and of the Assembly. Acting in the execution of the power thereby given, the Legislature of *Victoria* passed the Act, 20 Vict. No. 1, on the 25th of February, 1857, which, after reciting the Imperial Act, or the Act scheduled to the Imperial Act, proceeded by the first section to enact in these words: "The Legislative Council and Legislative Assembly of *Victoria* respectively, and the Committees and Members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly respectively, and of the Committees and Members thereof respectively, are hereby defined to be the same as at the time of the passing of the said recited Act were held, enjoyed, and exercised by the Commons House of Parliament of *Great Britain* and *Ireland*, and by the Committees and Members thereof, so far as the same are not inconsistent with the said recited Act, whether such privileges, immunities, and powers were so held, possessed, or enjoyed by custom, Statute, or otherwise."

Now, in the case of *Dill* v. *Murphy* (1), by the Order of Her Majesty in Council, following the advice of this Committee, it has been already determined that the exercise in the Colony of such a power as is given by the Imperial Statute, has been a good exercise of that power, and has sufficiently carried over to the Council and Legislative Assembly of the Colony the powers which are compendiously described in the section that I have read as the like privileges, immunities, and powers as were held, enjoyed, and exer-

(1) 1 Moore's P. C. Cases (N. S.) 487.

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cised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and Members thereof; and that it was not necessary to specify in detail those powers, and that it was sufficient to refer to them as the powers of the House of Commons. That same decision, if not expressly, at least inferentially, has also determined this, that the privileges of the House of Commons must be taken notice of judicially, and it follows from this that the powers and privileges of the House of Commons in the year 1855 must also be taken notice of judicially, for it is of the essence of any judicial notice of those powers and privileges, that the Court taking notice of them, should know at what time they were exercised by the House of Commons.

Beyond all doubt, one of the privileges—and one of the most important privileges of the House of Commons—is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated, been well established in this Country that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a Warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is. It would, therefore, almost of necessity follow, that the Legislature of the Colony having been permitted to carry over to the Colony the privileges, immunities, and powers of the House of Commons, and having in terms carried over all the privileges and powers exercised by the House of Commons at the date of the Statute, there was carried over to the Legislative Assembly of the Colony the privilege or power of the House of Commons connected with contempt—the privilege or power, namely, of committing for contempt, of judging itself of what is contempt, and of committing for contempt by a Warrant stating generally that a contempt had taken place. It has, however, been argued before us that the privilege is the privilege of committing for contempt merely; that the judging of contempt without appeal, and the power of committing by a general Warrant, are mere incidents or accidents applicable to this Country, and not transferred to the Colony. Their Lordships are entirely unable to accede to this argument. They consider that there is an essential difference between a privilege of committing for contempt such as would be

enjoyed by an inferior Court, namely, privilege of first determining for itself what is contempt, then of stating the character of the contempt upon a Warrant, and then of having that Warrant subjected to review by some superior Tribunal, and running the chance whether that superior Tribunal will agree or disagree with the determination of the inferior Court, and the privilege of a body which determines for itself, without review, what is contempt, and acting upon the determination, commits for that contempt, without specifying upon the Warrant the character or the nature of the contempt. The privileges, their Lordships think, as thus stated, are essentially different. The latter of the two privileges is a higher and more important one than the former. The ingredients of judging the contempt, and committing by a general Warrant, are perhaps the most important ingredients in the privileges which the House of Commons in this Country possesses; and it would be strange indeed if, under a power to transfer the whole of the privileges and powers of the House of Commons, that which would only be a part, and a comparatively insignificant part, of this privilege and power were transferred.

Their Lordships are of opinion, that the full privilege and power has been transferred to the Colony entire, and that the Warrant in this case has followed the possession of that privilege and power, and is a sufficient answer to the Writ of *Habeas Corpus*.

Their Lordships, therefore, upon these grounds will humbly advise Her Majesty that the Orders of the Court in the Colony should be reversed.

In the present case their Lordships understand that special leave was given to the Speaker of the Legislative Assembly to appeal, upon the ground that the question raised was one of public and general importance, and was not merely a question between the Legislative Assembly and the particular Respondent in the present case. Under those circumstances their Lordships take it for granted that no application will be made by the Appellant for costs, and they think that no order for the costs of the appeal ought to be made.

Solicitors for the Appellant: *Freshfields.*
Solicitors for the Respondent: *Wilde, Wilde, Berger, & Moore.*

J. C.*
1871
Jan. 28.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA . . } APPELLANTS;

AND

THOMAS DICKSON AND CHRISTOPHER TATHAM, LATELY TRADING AS DICKSON, TATHAM, & CO. . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Promissory note—Continuing security—Time for presentation, reasonable with reference to the circumstances of the case.

The law with regard to time for the presentation of a Promissory note, payable on demand, requires that the presentation for payment be made within a reasonable time—that is, a period reasonable with reference to the circumstances connected with each particular case.

Where, therefore, a Promissory note, dated the 16th of February, 1864, and indorsed, though made payable on demand, but the payment of which was not contemplated by the Makers at any immediate or specific date, was not presented to the Payee for payment until the 14th of December in the same year; it was *held* by the Judicial Committee (overruling the judgment of both the Inferior and Superior Courts below), that it appearing from the evidence, that the Note was meant to be, to a greater or less extent, a continuing security, the delay in presentation was, in the circumstances of the case, not unreasonable, and the holders of the Note were entitled to recover thereon.

THIS was an appeal against a decision of the Supreme Court of *Ceylon*, affirming a decree of the District Court of *Colombo*, whereby the claim of the Appellants, as far as the Respondent, *Dickson*, was concerned, was dismissed.

Dickson and *Tatham* were, at the date of the Promissory note hereinafter mentioned, carrying on business at *Colombo*, under the style or Firm of *Dickson, Tatham, & Co.*

The action was brought by the Appellants against the Respondents *Dickson* and *Tatham*, to recover the sum of £5,000 and interest upon a Promissory note, dated the 16th of February, 1864, by which *Sinne Lebbe, Brothers*, of *Colombo*, promised to pay to Messrs. *Dickson, Tatham, & Co.*, or order, at *Colombo*, the sum

* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), and SIR JOSEPH NAPIER, BART.

of £5,000 value received. The Promissory note was indorsed by Messrs. *Dickson, Tatham, & Co.*, to one *E. Nanny Tamby*, who indorsed the same for value to the Appellants. The Note, though dated the 16th of February, 1864, was not presented for payment before the 14th of December in that year.

Dickson pleaded, amongst other defences, that no notice of dishonour was given to him, and that the Note was indorsed by the Defendants' Firm, for the accommodation of the Makers; that the Appellants had notice of it; that he was discharged from liability, by reason of the time given by the Appellants to the Makers, and by subsequent arrangements made by the Appellants with the Makers; that there was undue delay in presenting the Note, and that he was thereby released; that the Note had been paid by the Makers or the other Indorsers; that after the retirement of the Defendant, *Dickson*, from the Firm, the Appellants adopted the new Firm, consisting of the other Defendant, *Tatham*, alone, as their Debtors, and discharged the Defendant, *Dickson;* and that the Defendant, *Tatham*, indorsed the Note for the accommodation of the Plaintiffs, and the Makers, in breach of the partnership deed between the Defendants, and with notice thereof.

The case was heard on the 9th of March, 1868, before Mr. *George Lawson*, the Judge of the District Court, and evidence was gone into, the material part of which is referred to in their Lordships' judgment. The judgment of the District Court of *Colombo* was delivered on the 31st of March, 1868, dismissing the claim of the Appellants, so far as the Respondent, *Dickson*, was concerned, on the ground that there had been unreasonable delay on the part of the Plaintiffs in presenting the Promissory Note sued on for payment, and that by such delay the Defendant *Dickson* was discharged.

The Appellants appealed, and on the 3rd of December, 1868, the Supreme Court affirmed the decree of the District Court, and on the 1st of July, 1869, that Court, upon a rehearing of the case, by way of review, confirmed the judgment already pronounced. Against these decisions the present appeal was brought.

Sir *R. Palmer*, Q.C.; Mr. *Field*, Q.C.; and Mr. *S. Everitt*, for the Appellants:—

The Appellants, a Banking Firm, were holders of the Promissory

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note issued by the Respondent's Firm, for valuable consideration. A Promissory note differs from a Bill of Exchange, or a cheque, it is a continuing security: *Brooks* v. *Mitchell* (1); not requiring to be presented at a day certain: *Byles* on Bills, p. 202 [Ed. 1866], where it is laid down, that if an Indorsee defends himself on the ground of delay in presenting the Note, it is a question for the jury whether, under all the circumstances, the delay of presentment was or was not unreasonable; or, as a Foreign Bill of Exchange, within a reasonable time: *Ramchurn Mullick* v. *Luchmeechund Radakissen* (2). In the circumstances disclosed by the evidence there was no improper or unreasonable delay in the presentment of the Promissory Note, and if there had been, the *onus* of proving such was on the Respondents, the Defendants below, who failed to do so. The Respondent, *Dickson*, was a partner of the Firm of *Dickson, Tatham, & Co.*, at the time the Note was indorsed by the Firm, and continued liable notwithstanding the change of Firm. The Appellants never released their right against him, or consented to accept the limited liability of any other person or Firm.

Sir *John Karslake*, Q.C., and Mr. *Matthews*, Q.C., for the Respondent, *Dickson*:—

The Respondents are in possession of two judgments. The decision both of the District Court and the Supreme Court was in their favour, on the ground of the unreasonable delay in presenting the Promissory Note. The learned Judges express no doubt on the subject. The question was one of fact upon the evidence, and this Tribunal is very slow to disturb the finding of the Courts below upon a question of evidence. The evidence proves that the Promissory Note was only intended to be binding in case certain arrangements between the parties, which were never carried out, were completed; the conditions contemplated and stipulated for were not complied with. The presentation of a Foreign Bill of Exchange must be within a reasonable time, as laid down in *Ramchurn Mullick* v. *Luchmeechund Radakissen;* but what constitutes a reasonable time is a mixed question of law and fact, to be determined by the Court and the jury. In *Godfray* v. *Coulman* (3), where

(1) 9 M. & W. 15. (2) 9 Moore's P. C. Cases, 46.
(3) 13 Moore's P. C. Cases, 11.

a Foreign Bill of Exchange, payable to the Drawer's correspondent in *London* three days after sight, was not presented until thirty-seven days, it was held, in the circumstances, not to be an unreasonable delay; but here the delay is beyond all bounds. The result of the English and also American authorities is, that a Promissory Note must be presented within a reasonable time, and that is the real question here to be decided: *Story* on Bills, §§ 323, 325; *Martin* v. *Winslow* (1); *Field* v. *Nickerson* (2); *Havers* v. *Huntington* (3).

Their Lordships' judgment was delivered by

LORD CAIRNS:—

In this case, in which the action was based upon a claim by the Appellants, the *Chartered Mercantile Bank of India*, as holders of a Promissory Note for £5,000, against *Dickson* and *Tatham* as Payees and Indorsers of the Note, various defences were pleaded by the present Respondent, *Thomas Dickson*. It is necessary to mention those defences in order to see what question, and what question only, is open upon this appeal. The first defence by *Dickson*, by way of plea, was that he ceased to be a partner of the Firm of *Dickson, Tatham, & Co.*, "before the presentation and dishonour of the said Note, of which the Plaintiff had due notice, and that no notice of dishonour of the Note was given to this Defendant." Notice, however, of dishonour was given to *Tatham*, the partner in the Colony, charged with the liquidation of the affairs of the partnership, and as this issue has been found against the Respondent, it need not be further referred to. The next plea raised this defence: it says, "The Note was indorsed by the Firm of *Dickson, Tatham, & Co.* as sureties for and for the accommodation of the Makers thereof, of which the Plaintiff had full notice; that the said Defendant is discharged from his liability under the said Note, by reason of the time given by the Plaintiff with the Makers of the said Note, and by subsequent arrangements made by the Plaintiff with the Makers, who furnished other securities for the said Note.' That issue also has been found against the Respondent, and is not now open. We pass over the third plea for the present, and pro-

(1) 2 Mason's (Amer.) Rep. 241. (2) 13 Mass. (Amer.) Rep. 131.
(3) 1 Cowen (Amer.), 387.

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ceed to the fourth. The fourth plea was: "The said Note has been paid either in account with the Makers or the other Indorser thereof, or by the cross drafts with securities attached, given by the Makers or by the said other Indorser." That issue also has been found against the Respondent. The fifth is, that "after his retirement from the Firm, the Plaintiffs adopted the new Firm of *Dickson, Tatham, & Co.*, then consisting of the remaining Partner, *Christopher Tatham* alone, as their Debtors, and discharged this Defendant." For that plea there was no foundation, and it has been found against the Respondent. The sixth is, "*Tatham* made the same Note as an accommodation Note for the convenience and accommodation of the Plaintiff, and the Maker thereof, and in breach of the deed of partnership between the first and second Defendants, and that the Plaintiff was fully aware of the existence of the said deed of partnership, and of the covenant therein, between the parties prohibiting the making or indorsing any accommodation or other Bills which were not for the benefit of the partnership." That issue has also been found against the Respondent.

The result, therefore, is, that with regard to the inception of the Note and its validity at the time of the making of it, all the defences which denied its validity or qualified its effect, according to what the law would impute to it upon the face of it, all those issues were found against the Respondent, and it must now be taken that the Note at its original making was a valid Note, binding all the parties according to the contract which the law would imply, and uncontrolled by any collateral agreement.

The third plea, which we passed over, states "That there was undue delay in presenting the said Note, and the Defendant is thereby released from his obligation thereunder." Now, that plea raises a question which has been called a mixed question of law and fact. This issue has been found in favour of the Respondent by the Primary Court in *Ceylon*, and, upon appeal, by the appellate Court. It is to be observed that upon the occasion of that appeal the only question before the appellate Court again was the question of the validity of this defence contained in the third plea. There was no cross-appeal on the part of the Respondent, attempting to re-open the other issues which had been found against him by the Primary Court.

The plea, therefore, raises the question (one of very great importance), what is the law with regard to the time for the presentation of a promissory Note, payable upon demand, and indorsed over? It is contended that the law upon this subject requires a presentation to the Maker of the Promissory Note within reasonable time, and that the proper issue to be considered when a question of this kind is raised—the proper direction to be given to a jury—the proper proposition to which a Court, judging of the fact, is to address itself—is this, was or was not the Note presented within a reasonable time?

The authorities upon this point in English law are certainly meagre. The cases of Bills of Exchange and of Cheques stand upon a footing obviously different, and the law as to them does not by any means of necessity decide the present question. We have been referred to some American authorities in support of the proposition, that the question to be determined is always, whether the presentation for payment was made within a reasonable time. Their Lordships think it better to assume, as was contended by the Respondent, that this is a proper definition of the question to be considered. They would be unwilling to preclude any argument upon that in any other case when there might be an opportunity of considering it more fully. It is sufficient to assume it in the present case, and to deal with this case upon the assumption made by the Respondents, that if it turned out that presentation of this Note was not made within a period which they term a reasonable period—that is, a period reasonable with reference to the circumstances connected with this particular Note—he, the Indorser, is discharged.

Now, before adverting to the opinion of the Courts below upon this point, their Lordships will state what, in their opinion, is the result of the evidence in this case. It appears that the Note in question was dated on the 16th of February, 1864. The findings of the Courts below compel us to assume that at the time of the making of the Note it was a valid Note, as to which, at the time of its making, it was not open to the Respondent, *Dickson*, to impeach, control, or limit his liability. Upon the face of it the Note runs in this form: "On demand we promise to pay to Messrs. *Dickson, Tatham, & Co*, or order here, the sum of five thousand pounds value received,

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Sinne Lebbe, Bros." Indorsed "*Dickson, Tatham & Co.*" Then "Pay the *Chartered Mercantile Bank of India, London,* and *China,* or order. *E. Nanny Tamby.*"

Now, treating this as a valid Note in its inception, and taking the Note on the face of it, the Note would import, according to the ordinary rule of law, that the Makers were the principal Debtors, that the Payees of the Note who indorse it were merely sureties, and that that was the relative position of those two parties upon this instrument.

Their Lordships consider that the result of the evidence both of Mr. *Le Marchand,* the Manager of the Bank, and of Mr. *Tatham,* the Partner in *Dickson, Tatham, & Co.*—judging of that evidence by the findings of the Court, to which reference has already been made—shews, that the position of the parties, with regard to this Note, was really that position which the law itself would imply from the appearance of the Note itself, namely, that *Sinne Lebbe Brothers,* were the principal Debtors, that *Dickson, Tatham, & Co.* were sureties; and they are of opinion, that it is perfectly made out that the Bank were aware of that fact. Their Lordships think it also clear that, although the Note is payable on demand, no payment of the Note by the Makers at any immediate or specific date was contemplated, and, therefore, the Note was meant to be, to a greater or less extent, a continuing security.

It appears, then, that this being the case, Mr. *Tatham,* the Partner in the Colony, left the Colony. The date is not precisely given, but it was about the end of February or the beginning of March, 1864. It appears that, before he left the Colony he had had a conversation with the Manager of the Bank. He and the Manager of the Bank are in dispute as to what the nature and effect of that conversation was; but there is no suggestion on the part of Mr. *Tatham* that, whatever he may have said about the Note at that conversation, he at that time indicated any wish on his part that the Note, if valid, should be pressed against *Sinne Lebbe, Brothers;* that any early period should be taken for making a demand, or that any communication should be made to them as Indorsers of what was done by the Bank as to pressing payment of the Note from *Sinne Libbe, Brothers.* He left *England,* and was absent from the Colony for some months. He returned in the month of August,

in the same year, to the Colony. At that time he states, that he found the account of *Sinne Libbe, Brothers*, with his own House, was in, what he terms, an unsatisfactory position. A sum of upwards of £6,000 was due upon it, and there were some other claims that they might have against *Sinne Lebbe, Brothers*. During his absence in *England*, in consequence of some disputes with his Partner, the partnership of *Dickson, Tatham, & Co.* had been dissolved. The dissolution was to take effect from the 13th of June, 1864, and upon the evidence it must be taken that that dissolution was known in the Colony soon afterwards, probably the end of July or in the month of August in that year.

Their Lordships, however, are of opinion, that with the disputes between Mr. *Tatham* and his Partner they have nothing in this proceeding to do. Mr. *Dickson*, if he was entirely dissatisfied with the conduct of Mr. *Tatham*, might have come out himself to *Ceylon* and taken the management of affairs there; or, if the conduct of Mr. *Tatham* was such as was altogether irregular in a Partner, Mr. *Dickson* might have applied to a Court to curtail his rights to deal with the assets, and to have a Receiver appointed. He took neither of these courses, and Mr. *Tatham* returned to the Colony, notwithstanding the dissolution, as the person invested both by law, and indeed by agreement under the articles of dissolution, with the right to liquidate and wind up the estate, and to do all that was incidental to that liquidation. The acts, therefore, of Mr. *Tatham* after the return to the Colony, must be looked upon as the acts of the partnership in liquidation, and must not be embarrassed by any considerations of dissatisfaction that Mr. *Dickson* may have felt with the course taken by Mr. *Tatham*.

Having returned to the Colony, Mr. *Tatham*, on the 22nd of September, 1864, wrote a Letter to the Firm of *Sinne Lebbe & Co.* Writing in the name of the Firm of *Dickson, Tatham, & Co.*, he says: "Dear Sirs—We beg to hand you our account in *re* the advance on plantation Coffee, showing a balance of £6,433. 19*s.* 6*d.* in our favour, per 14th September. We are unable to hand you accounts for other claims, but to enable you to estimate our relative position, we think they will be: first"—an item which I need not refer to; "second and third"—items also which have nothing to say to the present case, but which are considerable in amount; "fourth,

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guaranteed Bill to the *C. M.* Bank" (that is the *Chartered Mercantile Bank*) "£5,000; fifth, balance due on first contract, native coffee, with interest to the 30th of June, 1864." All those items are added up, and they make together a total of £20,788. And the Letter continues—"irrespective of our claim for allowance on Coffee not delivered, as p. Bond (on the Bond itself) and indent of piece goods amounting to upwards of £8,000, you will, of course, understand we name these sums without prejudice to any larger claims we may hereafter find to be owing by you."

Now, the first observation which arises upon this Letter is this: that it, of course, made almost inevitable the conclusion at which the Court in the Colony has arrived upon the other issues in this case. It would be utterly impossible that the partnership, on behalf of whom this Letter was written, could be held to aver that, in their opinion, at any period at or after the time of making the Promissory Note up to this 22nd of September, they entertained the opinion, that the Note was not a Note originally binding upon them, or a Note controlled or superseded by any collateral agreement. But it also, in their Lordships' opinion, puts an end to the question of any delay up to the 22nd of September in the presentation of the Note for payment. It is impossible to suppose the Partnership on behalf of whom this Letter was written, who treat this Bill, "guaranteed" to the *Chartered Mercantile Bank* as the foundation of a claim which they would have against the Firm of *Sinne Lebbe & Co.* contending that at that time they were of opinion, that by reason of delay in presenting that Note all remedy against them upon it had come to an end. If the Note had been presented and dishonoured, notice would have been given to them. They must, therefore, have been aware that the Note had not been presented for payment; the payment had not been demanded; that it was with the *Chartered Mercantile Bank;* and they treated it as a Note upon which a claim might be made against them. It was suggested that the Letter might have been written with reference to the contingency of the Note passing into the hands of third parties and thus being made in third hands the foundation of a claim. It is scarcely possible to accept that view of the Letter. If the House of *Dickson, Tatham, & Co.* believed that there was no claim against them on the part of the Bank, but that there might be a claim

against them if it got into circulation and was in the hands of third parties, the obvious course which would have been taken by Mr. *Tatham* would have been to go to the Bank and say, "Have you that Note still in your possession? You must take care, or I must see that you take care, that it does not get into circulation. You have no claim against us upon it; we must take care that it does not get into third hands, where there might be a claim against us on the Note." On the 22nd of September, therefore, it must have been the opinion of *Dickson, Tatham, & Co.* that there had been no delay in presenting this Note for payment.

We find, next, two facts of importance in the evidence of the case. Mr. *Tatham* states this: he says, "He first told me—that is, *Le Marchand* first told me—that he intended to hold me liable for the Note, in October or November, 1864." It is possible that may be so, but it is equally consistent with the case of the Bank that no doubt was entertained on their part of the liability of *Dickson, Tatham & Co.;* and it is certainly consistent with the Letter of Mr. *Tatham,* of the 22nd of September, which assumes the liability. However, the evidence continues: "*Le Marchand* and I at that time were holding meetings almost daily about *Sinne Lebbe's* affairs. They were insolvent at the time." And the same Witness, Mr. *Tatham,* says, speaking of his return, "I often saw *Le Marchand* about *Sinne Lebbe's* account (not the Note in particular) after my return to *Ceylon* in August. We were to receive a Cheque in full in case of the Bank arranging *Sinne Lebbe's* affairs in another quarter"—a Cheque in full, I suppose, for the whole of their demand—"Many arrangements were suggested. M. *Le Marchand* was always leading me on that he would settle, and I was very busy." We find, therefore, that the state of things was that after this Letter of the 22nd of September was written, and indeed before it, and from that time until the failure of *Sinne Lebbe,* Mr. *Le Marchand* and Mr. *Tatham* were in daily intercourse upon the affairs of *Sinne Lebbe,* clearly for the purpose of treating the position of *Sinne Lebbe* in the most judicious manner, both the Bank, and *Dickson, Tatham, & Co.* being interested in the same way in keeping *Sinne Lebbe & Co.,* as a House, on foot, and in preventing any pressure which might lead to their insolvency.

In that state of things we have, on the one hand, no suggestion

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whatever by Mr. *Tatham* that he—knowing that this Note was in existence, having treated it as that which might found a claim against *Sinne Lebbe, Brothers*—urged upon the Bank to present the Note and to ask for payment, and to put the Note, if necessary, in suit; and, on the other hand, we have it clearly and obviously the interest, not merely of the *Mercantile Bank*, but of *Dickson, Tatham, & Co.*, themselves in liquidation, that no sudden and abrupt proceeding of that kind should take place against *Sinne Lebbe, Brothers*, which could only have had the result of precipitating their Bankruptcy.

If then, on the 22nd of September, it was the opinion of *Dickson, Tatham, & Co.*, and, if it was the fact, that there had been no undue delay in presenting this Note, certainly the lapse of time afterwards, under the circumstances to which I have referred, cannot, in their Lordships' opinion, constitute an unreasonable delay.

Their Lordships, therefore, if this matter were *res integra* before them, and if they were addressing themselves to the inquiry, which I have assumed to be the proper one—whether the Note was presented in reasonable time—would be prepared to hold that, having regard to all the circumstances of this case, there was no unreasonable delay in presenting the Note. And they have now to consider the view that has been taken by the Courts below, in order to determine the advice which they should tender to Her Majesty with regard to this appeal.

Now, their Lordships have always been anxious to maintain the view that upon questions of fact, where there is a conflict of evidence in the Court below, where the weight to be given to the evidence depends considerably upon the manner, upon the demeanour, and the appearance of the Witnesses,—where of local matters the local Judges are more generally the best able to form a true and correct opinion; that in cases of that kind it is inexpedient that this Tribunal should differ from the conclusions of fact arrived at in the Court below, unless they are clearly of opinion, that the Court below was in error. In this case, however, there is considerable peculiarity. The inquiry, which we have assumed to be the proper one, is a mixed question of law and of fact. There is here no controversy in the materials with which we have now to deal upon the question of fact. The Courts below have found all

the questions of fact by their findings upon the other issues to which reference has been made; and the real question is, whether those findings of fact have been properly applied in dealing with the issue now under consideration?

Now, what their Lordships find to have been the course taken by the Primary Court was this. The learned Judge, after disposing of all the other issues, proceeds thus, "It remains, therefore, only to consider the third plea, that there was undue delay in the presentation of the Note by Plaintiffs, whereby the Defendants were released." Then he cites a passage on the subject from *Byles* on Bills, and he continues, "The Court, therefore, has to consider whether there were circumstances in the present case which made it the duty of the Plaintiffs to present the Note at an earlier date than that actually chosen by them. The Plaintiffs, it must be noticed, were Bankers, and the Makers and Indorsers were all their Customers. In January, 1864, before the Note was given, the first Defendant complained to the Manager of the Bank in *London* of the conduct of the Manager in *Colombo*, who had taken drafts of the second Defendant, then managing the business of the Firm in *Colombo*, for large amounts without their being properly covered." Now, their Lordships pause there for the purpose of saying that this which appears to enter into the judgment as a reason, is a circumstance which clearly is altogether irrelevant. A communication made to the Bank in *London*, in January, 1864, which, in fact, was an expression of disapproval, on the part of Mr. *Dickson*, of the conduct of the Manager of the Bank in *Colombo*, would, in the first place, be a communication unlikely to reach the Manager of the Bank in *Colombo*. But whether it would or would not, it has nothing whatever to say to the circumstances of the present case—it was no complaint with reference to the present Note, or the transaction out of which that Note originated. The learned Judge continues: "The partnership between the first and second Defendants was dissolved on the 30th of June, 1864, and the Manager of the Bank in London was aware of the dissolution. The Manager of the *Colombo* branch must, therefore, have been aware of it early in August, probably about the 4th or 5th. The business of the Firm after the dissolution continued to be carried on by the second Defendant, and the Plaintiffs were employed by the

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first Defendant to receive from the second the proceeds of his share in the partnership assets, as the same were, from time to time realized, and to remit them to him, and from August to December the Bank was in constant correspondence with the first Defendant as to these recoveries and remittances. During the whole of this period, the position of *Sinne Lebbe, Brothers*, the Makers of the Note, was known to the Managers of the Bank, both in *London* and *Colombo*, to be most critical. The Manager in *Colombo* was also aware that the negotiation between the Defendants and Messrs. *Sinne Lebbe, Brothers*, respecting the advance by the former to the latter of a sum of £50,000, of which this £5,000, raised by means of the Note, formed part, had been broken off. The dangerous position in which the Maker of the Note stood throughout the year 1864, the failure of the consideration which had induced the second Defendant to indorse the Note, and the anxiety of the first Defendant to close all his accounts with his late Firm, were all reasons which should have induced the Plaintiffs to lose no time in presenting the Note." Now, if the learned Judge means to say, that the knowledge that the contemplated loan of £50,000 out of which this £5,000 was to be repaid, had gone off, should have made the Bank lose no time in presenting the Note, his view must go to this, that it was the duty of the Bank immediately upon that loan going off, to have presented and insisted on payment of the Note. It is sufficient to say that with any such idea the letter of the 22nd of September is altogether irreconcileable, and it is unnecessary to observe further upon it. If the learned Judge means to say, that the fact of the dissolution of the Firm, the fact that Mr. *Dickson* was employing the Bank to get in the proceeds of his share of the partnership assets and to remit them to him, ought at that time to have caused some greater celerity in presenting the Note than otherwise would have been the duty of the Holders of it—their Lordships consider that, although it may be proper to look at the dissolution as a fact in the history of the case, that must be taken in connection with the management of the liquidation of the affairs of the house of *Dickson, Tatham, & Co.*, in the Colony, by Mr. *Tatham*, and they have already adverted to that which the learned Judge here appears to have overlooked—the conduct of Mr. *Tatham* in the Colony with reference to that liquidation.

Their Lordships, therefore, find with regard to the Judge of the Court of First Instance, that he appears to have attached weight to circumstances in the case which are not, as their Lordships conceive, the circumstances which really must govern the decision, and to have overlooked altogether those material considerations to which reference has already been made.

When the case came before the appellate Tribunal, the part of the judgment referring to this matter is in these words:—"We think it also clear, that the Bank knew that the arrangement was to be one for the benefit of the Defendants, as well as for the benefit of the Bank and *Sinne Lebbe*. When this arrangement was abandoned, and when all hopes of effecting any similar arrangement, as well as for the benefit of the Bank and *Sinne Lebbe*, were at an end, which they certainly were long before December, 1864, the Bank had no right to treat this Note as a continuing security as regarded these Defendants." Their Lordships are obliged to say, that that appears to them to be in direct opposition to the finding of the Court upon the other issues, which treat this Note as a Note valid in its inception, and a Note which, subject to the one question of whether it was presented within reasonable time, was a continuing security for the Bank against the Defendants. The judgment then goes on: "Whether they had then any rights at all against this Defendant on the Note seems extremely questionable." A question again depending on a part of the case which is completely decided and out of controversy by the findings on the other issues. "But they certainly ought to have either cancelled the Note or to have acted promptly in the matter against the proper parties, and not to have allowed *Sinne Lebbe's* affairs to go from bad to worse without making some attempt to enforce payment or to obtain further security in respect of this £5,000, while they were vigilant as to other sums in respect of which they had claims against *Sinne Lebbe*, but as to which they had not Notes indorsed by the Defendants." We are not in possession of what is referred to here, where the Court says, that they were vigilant as to other sums in respect of which they had claims against *Sinne Lebbe*. There does not appear to be any evidence upon that; but, as regards the other observations of the Court, their Lordships are of opinion, that they appear to be made in forgetfulness of this, that the time

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at which payment of a Note of this kind is to be demanded and urged upon the Maker must be judged of with reference not merely to the circumstances of the Maker, but with reference also to the convenience of the Indorser, against whom the second demand would be made. It may be very true that the affairs of *Sinne Lebbe* were going from bad to worse, but, on the other hand, it may have been the very worst possible thing for the Indorser to have precipitated that downward course of the Firm of *Sinne Lebbe, Brothers.* And, when we look at the facts of the case, to which reference has already been made, their Lordships are of opinion, that it was not merely for the interests, but that it was the wish of both parties, both the Bank and the Partner of *Dickson, Tatham, & Co.*, in the Colony, that no undue pressure should take place against *Sinne Lebbe, Brothers.*

Their Lordships, therefore, find that, not upon a dispute of facts, but upon the application of the law to the facts of the case, they are unable to concur in the reasoning of the first Court or of the Court of appeal in the Colony. They are of opinion, that the decision in the Colony cannot be supported. They will humbly advise Her Majesty that the appeal ought to be allowed; that judgment should be entered for the Appellants for the amount of the Note, with interest at the rate of the Colony, which their Lordships observe is nine per cent., with costs in the Court below; and that the Appellants should have the costs of this appeal.

Solicitors for the Appellants: *Clarke, Son, & Rawlins.*
Solicitors for the Respondents: *Waltons, Bubb, & Waltons.*

JARVIST ARNOLD AND OTHERS . . . . . APPELLANTS;

AND

CHARLES GEORGE COWIE AND SONS AND OTHERS . . . . . } RESPONDENTS.

J. C.*
1871
Feb. 8.

THE "GLENDUROR."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Salvage—Quantum to Salvors saving Life, Ship and Cargo, remuneration increased by appellate Court.

Salvage services of a highly meritorious character having been performed by Salvors, in saving the lives of the Crew, and the Ship and cargo, valued at £46,000, the Admiralty Court awarded £1,000 as salvage for such services. On appeal, *held*, that the sum was insufficient, and the remuneration increased to £2,000, in consideration (1) of the great danger the Salvors incurred; and (2) the fact of the saving of lives, and the value of the Ship and cargo.

A CAUSE of salvage instituted by the Appellants against the *Glenduror*, the cargo and freight, and against the Respondents, the Owners of that Vessel, her cargo and freight. The salvage services were admitted by the Respondents, and a tender made by them of £500, which was refused. The Court awarded £1,000, and the sole question raised by the appeal was, whether the *quantum* of remuneration so awarded by the Court for salvage services was, in the circumstances, sufficient.

The facts, as detailed in the petition, were not disputed. The petition alleged, that about 8 P.M. on the 12th of February, 1870, the *Glenduror*, a full-rigged iron ship of 994·53 tons burden, after making signals of distress, came stern on to the shore, a little to the northward of *Kingsdown*, having parted her cables in a tremendous gale which was then blowing; that the *Kingsdown* Life Boat was manned several times by the Appellants, who with great danger, and with the help of some sixty or seventy men, rescued twenty-nine persons from the *Glenduror;* that during the whole

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of the following week, the Appellants, eighty in number, besides the Owners of the Life Boat, the Lugger, and the other Boats mentioned in the petition which were engaged, by lightening the Ship, landing, and carefully warehousing part of her cargo, and by means of anchors and chains skilfully disposed, succeeded in getting the Ship off and bringing her safely to *London;* and that the *Glenduror*, her cargo and freight, as salved, were of the total value of £46,000.

The answer of the Respondents admitted the saving of the lives of the twenty-nine persons; but alleged that the discharge of the cargo and salvage of the Vessel was not performed by the Appellants, but by the Master, under the advice and assistance of the Owners, Agent, and Crew of the Vessel. The answer also alleged a tender of £500 to the Appellants in full satisfaction and discharge of their services.

The evidence adduced by the Appellants established the averments in the petition, and, further, that the Crew of the *Glenduror* were discharged, and took no part in salving the Ship and cargo. The Respondents called no evidence to rebut the Appellants' case, or support their own. The Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) found for the Appellants, and awarded them a sum of £1,000 for salvage services, with costs.

The Appellants being dissatisfied with the sum so awarded brought the present appeal.

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *E. C. Clarkson*, for the Appellants:—

Having regard to the value of the *Glenduror* and her cargo, viz. £46,000, the sum awarded by the Court was an utterly insufficient remuneration to the Salvors for the services rendered and the great danger incurred by them: *The Branken Moor* (1)—services which resulted in the saving of the Ship and cargo, as well as the lives of twenty-nine persons, at the risk of the Salvors' own lives. This latter fact is an important ingredient in estimating salvage reward: Statute, 17 & 18 Vict. c. 104, ss. 458–9; *The Fusilier* (2); *The Thomas Fielden* (3); which fact the learned Judge of the Admi-

(1) 3 Hagg. Adm. Rep. 374. (2) 3 Moore's P. C. Cases (N.S.) 51.
(3) 32 L. J. (Ad.) 61.

ralty Court has not sufficiently taken into consideration. The principles to be observed in estimating the reward for salvage services are clearly laid down by Lord *Stowell*, in *The Clifton, Lightbody* (1), and have been followed by Sir *John Nicholl* and Dr. *Lushington*. This Tribunal, though loath to interfere with the discretion of the Judge of the Court below in estimating and awarding the amount of remuneration proper for salvage services: *The Clarisse* (2); *The Neptune* (3); *The England* (4); will, if the facts clearly justify an increase, award a larger sum: *The True Blue* (5); *The Inca* (6); *The Carrier Dove* (7); *The Scindia* (8); and, on the other hand, if if the services are overrated by the Court below they may be reduced: *The Chetah* (9).

Mr. *Butt*, Q.C., and Mr. *A. Cohen*, for the Respondents:—

Although it is not disputed that valuable salvage services were rendered by the Appellants, yet, we submit, the sum awarded by the Court below was, in the circumstances, an ample and sufficient remuneration for such services; and this Tribunal is always unwilling to interfere with the exercise of the discretion of the Court below in estimating the value of the services so rendered: *The Chetah* (10); *The Fusilier* (11).

Judgment was delivered by

LORD JUSTICE JAMES:—

This is an appeal in a cause of salvage from the Court of Admiralty, the Salvors being dissatisfied with the *quantum* of remuneration which that Court has thought fit to award them. Their Lordships have had to consider the question with the difficulty which has pressed upon this Board in all these salvage cases, of laying down any principle by which this Tribunal is to overrule that which to a great extent must be considered as especially within the discretion of the Court below, in a matter of individual estimate

(1) 3 Hagg. Adm. Rep. 120.
(2) 12 Moore's P. C. Cases, 340.
(3) Ibid. 346.
(4) Law Rep. 2 P. C. 253.
(5) Ibid. 1 P. C. 250.
(6) 12 Moore's P. C. Cases, 187.
(7) 2 Moore's P. C. Cases (N.S.) 254.
(8) Law Rep. 1 P. C. 241.
(9) Ibid. 2 P. C. 205.
(10) Law Rep. 2 P. C. 209.
(11) 3 Moore's P. C. Cases, 69.

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and opinion, as to the value of the services rendered, or the reward which ought to be paid by the persons to whom such services have been rendered, under all the circumstances of the case. In some of the cases which have been referred to in argument, the difficulty has been stated in very strong language; namely, that this Committee would not enter into the question of *quantum* where there has been "nothing to shock the conscience, nothing gross or extravagant": *The Carrier Dove* (1). In the case of *The Clarisse* (2), there follows a more accurate expression of the rule according to their Lordships' view:—Their Lordships there say, "It is, however, a settled rule and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion."

Now, the facts of the present case are not really in dispute. The judgment of the learned Judge of the Court of Admiralty on the facts has not been questioned by either side, and it is not necessary for their Lordships to refer to the facts in any other terms than those which the learned Judge himself has used in stating the nature of the case, and the circumstances under which the matter came before him for decision. The judgment concludes thus:—"Seeing, then, that these services saved lives while they were attended by, certainly, very great danger, which deterred the Crew who went on the first from going on the other expeditions, the question is, whether £500 is a sufficient remuneration for having materially contributed to save property of the large value of £46,000, and having saved the lives of twenty-nine persons who were on board; and having also to some extent perilled their own lives in the services which they rendered; and I am of opinion that it is not, and I shall award £1000 to the Salvors;" in which conclusion their Lordships entirely agree. But taking that as the true state of the case, their Lordships have to apply the rule which is probably best laid down in the case of *The Clifton, Lightbody* (3), where Lord *Stowell* expresses himself as follows:—"Now, salvage is not always a mere compensation for work and labour. Various circumstances upon public considerations, the interest of

(1) 2 Moore's P. C. Cases (N.S.) 254.

(2) 12 Moore's P. C. Cases, 344.

(3) 3 Hagg. Adm. Rep. 120.

commerce, the benefit and security of navigation, the lives of the Seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the Salvors in going out in tempestuous weather to assist a Vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow-subjects: secondly, the degree of danger and distress from which the property is rescued—whether it were in imminent peril or almost certainly lost, nothing out of it rescued and preserved: thirdly, the degree of labour and skill which the Salvor incurred and displayed, and the time occupied. Lastly, the value. Where all those circumstances concur, a large and liberal reward ought to be given." But he goes on, but where none or hardly any, then the thing ought to be *pro opere et labore*. Applying that rule to the facts as stated by the Judge of the Court of Admiralty in his judgment, their Lordships are of opinion, under all the circumstances of this case,—not forgetting that to a great extent there possibly was not that very great peril of life which was stated in the case of the Salvors, and that that peril was diminished after the first few hours; but still, having regard to all the circumstances which have been admitted and proved,—that the "large and liberal" reward in this case ought certainly to be something more than the sum of £1,000, which the learned Judge has awarded; and they have on the whole, having regard to the very great value of the Ship and Cargo saved, and to the numerous authorities they have been referred to, in none of which do they find such a small proportionate remuneration as this given, come to the conclusion that £2,000 would be a fairer sum to award to the Salvors. They have not omitted to weigh what was much pressed on them, that the real meritorious service was, on the first night, in saving the lives, and that what was done afterwards to the Ship—the anchoring, the unloading, the pumping, and the going round to the *Thames*—were ordinary services which any person might have rendered. But their Lordships do not think it right to split up the services of Salvors in this way, or to treat it as other than one continuous salvage service rendered to life and property. They have, moreover, shewed in this case, that according to the evidence of the Salvors (wholly uncontradicted), the Ship was left entirely to their care

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for several days; that what was devised and done was devised and done by them, and that they acted with great promptitude at a time when every hour might have been of vital importance. With respect to the amount of difference of estimate which would justify their Lordships to review the decision of the learned Judge, they were referred to the case of *The Scindia* (1), in which this Court differed to the extent of one-third. Unless the difference amounted at least to that they would not have interfered, but they think in this case the difference is so considerable as to induce their Lordships to express that difference in the judgment which they have pronounced.

The Appellants to have the cost of the appeal.

Solicitors for the Appellants: *Lowless, Nelson & Jones.*
Solicitors for the Respondents: *Westall & Roberts.*

J. C.* 1871 *Feb.* 9, 10.

THE OWNERS OF THE SHIP "FREEDOM" . . . . . } APPELLANTS;

AND

MESSRS. SIMMONDS, HUNT, & CO. . . . RESPONDENTS.

THE "FREEDOM."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Damage to Cargo—Title of Indorsee of Bill of lading under 18 & 19 *Vict. c.* 111, *s.* 1—*Right to sue*—24 *Vict. c.* 10, *s.* 6—"*Dangers of the Seas*" *excepted in Bills of lading, effect of exception—Defective stowage.*

8 C.B. 660 4 A.E. 447-8 QBD 377.

By the 18 & 19 Vict. c. 111, s. 1, the Consignee or Indorsee of goods named in a Bill of lading, and the Indorsee of a Bill of lading, to whom the property in the goods mentioned shall have passed by such indorsement, has transferred to and vested in him all rights of suit, and he is subject to the same liabilities in respect of such goods as if the contract in the Bill of lading had been made with himself.

The right of suing upon a contract, under a Bill of lading, follows the

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(1) Law Rep. 1 P. C. 241. 12 Jur N.S. 534

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property in the goods therein specified, that is, the legal title to the goods as against the Indorsee.

A cause of damage to cargo, instituted under sect. 6 of the Act, 24 Vict. c. 10, by the Consignees, who were also Assignees of the Bills of lading, to recover damages on account of breaches of contract and duty with respect to certain parcels of Oil-cake, which in the Bills of lading were agreed to be delivered in the like good order and condition as when shipped, the dangers of the Seas only excepted; but the Oilcake, when delivered, was in a greatly damaged and deteriorated condition, occasioned by the packing and stowage:—

Held, that as the proximate cause of damage arose from the nature and collocation of the cargo, consisting of animal, vegetable, and to some extent putrescible matter, and the want of due ventilation, it was not brought within the legal exception of "dangers of the Seas."

THIS was a cause of damage to cargo instituted under the 6th section of the Admiralty Court Act, 1861, to recover damages on account of breaches of contract and duty on the part of the Appellant with respect to certain parcels of Oil-cake, part of a cargo which was shipped on board the Appellants' Vessel, the *Freedom*, at *New York*, for delivery in *London*, of which no Owner or part-owner was at the time of the institution of the cause domiciled in *England*.

The facts were these:—

On the 3rd of September, 1868, Messrs. *Campbell & Thayer*, who were Manufacturers of Oil-cake at *New York*, caused to be shipped six parcels of goods consisting each of 500 bags of Oil-cake, marked respectively with certain marks and numbers, on board the *Freedom*, then lying in the port of *New York*, to be carried from *New York* to *London* upon the terms of six Bills of lading respectively.

These Bills of lading were signed by the Master of the *Freedom*, and delivered to Messrs. *Campbell & Thayer*, and, with the exception of the marks and numbers in the margin, were exactly similar to one another, the only perils excepted in them being, "the dangers of the Seas." The Bills of lading were afterwards indorsed by Messrs. *Campbell & Thayer* to the Respondents.

Some of the parcels of Oil-cake were delivered to the Respondents in a damaged state.

The Respondents, in the petition, alleged that they became and were the Consignees of the six parcels of Oil-cake, and Assignees

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of the six Bills of lading within the 6th section of the Admiralty Court Act, 1861, and they complained that the six parcels were delivered in *London* to them much damaged, and in worse order and condition than they were in when shipped, although this was not occasioned by the dangers of the Seas; and also that the six parcels were not delivered separately, but that, on the contrary, 3,000 bags were, by the Master of the *Freedom*, improperly and negligently delivered to the Respondents, all mixed up without regard to marks or numbers, and without the damaged portion being separated from the undamaged.

The Appellants, in their answer, denied the statements in the petition, and alleged that the damage, if any, to the Oil-cake was occasioned by the dangers of the Seas, or by the natural qualities of the Oil-cake, and not by any breach of contract or by any negligence or breach of duty on the part of the Master or Crew of the *Freedom*.

After hearing the evidence adduced on behalf of the Appellants and Respondents, the effect of which is mentioned in their Lordships' judgment, the learned Judge (The Right Hon. Sir *Robert Phillimore*) on the 4th of March, 1870, gave judgment on all points in favour of the Respondents (1), and by his decree pronounced for the damage proceeded for, with costs, and made the usual reference to the Registrar and Merchants to ascertain the amount of damage.

The present appeal was from this judgment.

Mr. *Butt*, Q.C., and Mr. *C. E. Clarkson*, for the Appellants:—

The question in this case is one of damage to cargo, and the first objection is, that the Respondents are not, as Consignees or Assignees of the Oil-cake, the damaged cargo, entitled to maintain a suit against the Appellants, even if they were liable to the Shippers of the Oil-cake. The Respondents were not Consignees or Assignees of the Bills of lading within the meaning of the 6th section of the Act to amend the Law relating to Bills of Lading, 18 & 19 Vict. c. 111, sec. 1. That Statute means an actual vesting of the property by Bargain and sale, where the property has actually passed: *per* Baron *Martin*, in *Fox* v. *Nott* (2). Here the contracts contained in the Bills of lading were made with

(1) 22 L. T. Rep. (N.S.) 175.

(2) 6 H. & N. 630—637.

7 Jur. N.S. 863.

the Shippers of the Oil-cake, and not with the Respondents, who could not, therefore, sue under the Statute, 24 Vict. c. 10. There was no negligence proved as regarded the Oil-cake, the inherent qualities of which, combined with the other matters falling within the category of the "dangers of the Seas," caused the damage to the Oil-cake. With regard to the delivery, it was proved that the Oil-cake was delivered over the Ship's side on the quay in the usual and accustomed way; there was no demand proved to have been made for any separate or specific delivery of the particular parcels of the Oil-cake. It was held in *Clark* v. *Barnwell* (1), an American case, that even if the Shipowner can prove that the loss was occasioned by an expected peril, the Shipper may still shew that the loss might have been avoided by the exercise of reasonable skill and attention on the part of the Carrier; but in such case the burden of proving this would be on the Shipper; and it appears that this has been held in *Hunt* v. *Propeller Cleveland* (2), and in other cases in the American Courts: *Parsons* on the Law of Shipping, Vol. I., p. 190, note 3. The Appellants were not bound by contract or usage to allow the Respondents to use the deck of the Ship for the purpose of sorting the damaged from the undamaged Oil-cake comprised in the Bills of lading.

Mr. *Milward*, Q.C., and Mr. *A. Cohen*, for the Respondents:—

The Respondents had a sufficient interest to entitle them to sue under the provisions of the 6th section of the *Admiralty Court Act* of 1861. It is not necessary, in order to entitle a party to sue under that Act, that the property in the goods should have passed to the same extent and in the same manner as would enable the parties entitled to them to sue in a Court of Common Law, as Indorsees of the Bills of lading. The American case of *Clark* v. *Barnwell* (3) is no authority. In the very same work from which it is cited, *Parsons'* Law of Shipping, Vol. I., p. 190, in note 2, the case of *Edwards* v. *Steamer Cahawba* (4) is stated, where the Bill of lading contained this clause, "not accountable for leakage, rust, or breakage, if properly stowed;" and it was held, that the burden was on the Carrier to shew proper stowage. The burden of proof

(1) 12 Howard, 272.
(2) 1 Newl. Adm. 221; 6 McLean, C. P. 76.
(3) 12 Howard, 272.
(4) 14 La. Amr. 224.

J. C. 1871 THE "FREEDOM." of reasonable care and skill on the part of the Carrier lies on him: *Parsons'* Law of Shipping, Vol. I., p. 190, citing the American authorities for that proposition. Here the injury complained of accrued on board Ship, and the burthen lay upon the Appellants to prove that the damage to the Oil-cake was occasioned by the dangers of the Seas, or by the nature and quality of the Oil-cake itself, which they failed to do. In *Kay* v. *Wheeler* (1) goods were injured during the voyage by Rats, and though the Shipowner had taken all possible precautions to prevent it, the Court held the Shipowner liable for the injury. With regard to the negligence in the delivery, and the damage occasioned thereby, the Appellants do not justify their conduct in the mode of delivery, they only deny the damage occasioned thereby; but the evidence is conclusive against them.

1871 *Feb.* 11. Their Lordships' judgment was pronounced by

SIR JOSEPH NAPIER:—

In this case a proceeding was instituted in the Court of Admiralty, under the 24 Vict. c. 10, s. 6, by which jurisdiction has been given to that Court over any claim by the Owner, or Consignee, or Assignee of any Bill of lading of any goods carried into any port of *England* or *Wales* in any Ship, for damage done to the goods, or any part thereof, by the negligence or misconduct, or for the breach of any duty or breach of contract on the part of the Master, Owner, or Crew. By this section a new remedy has been given to those who have a right of suit in any of the cases specified. By the 18 & 19 Vict. c. 111, sec. 1, the Consignee of goods named in a Bill of lading, and the Indorsee of a Bill of lading, to whom the property in the goods mentioned shall have passed upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract in the Bill of lading had been made with himself.

The transaction in the present case between the Plaintiffs and the Shippers of the goods in respect of which the suit was instituted, was one of a class described in the elaborate opinion of Mr. Justice *Buller*, in *Lickbarrow* v. *Mason* (2), delivered in the House

(1) Law Rep. 2 C. P. 302. (2) 6 East, 29, n.

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of Lords, in which he shews that the nature of the dealing requires that the property in the goods specified in the Bill of lading should be transferred to, and vested in, the Indorsee thereof. The Plaintiffs were Consignees for sale; but as part of the transaction a Bill of Exchange was drawn by the Consignors for nearly the full value of the goods, the Bills of lading were indorsed by them and forwarded to the Plaintiffs, by whom the draft of the Consignors was accepted and paid in due course.

The legal title to the property in the goods specified in the Bills of lading was thus transferred to, and vested in, the Plaintiffs; the right of suing upon the contract in the Bills of lading was transferred to them by force of the Statute, 18 & 19 Vict. c. 111.

It was suggested in the argument, that the applicability of this enactment was doubtful, in consequence of some words reported to have fallen from one of the learned Barons in the Court of Exchequer in the case of *Fox* v. *Nott* (1). But having regard to the facts of that case, and looking at the report in the *Law Journal* (2), it would seem to have been intended to decide no more as to the construction of the 18 & 19 Vict. c. 111, than that it had no application to the case; and that to entitle the Indorsee of a Bill of lading to have transferred to, and vested in, him a right of suit as thereby enacted, the circumstances under which the Bill of lading shall have been indorsed must be such that the property in the goods shall have passed to the Indorsee by reason of the indorsement. The Plaintiff in that case was the Charterer, and, as such, the Carrier. He had taken an assignment of the Bill of lading upon the terms that freight should be paid. It was attempted, on the part of the Defendant, to use the Statute as having extinguished the right of the Shipowner to freight, if he took an assignment of the Bill of lading, whereby (it was argued) he had lost his remedy against the Shipper for the freight. The Court decided in favour of the Plaintiff.

Their Lordships are satisfied, that it was intended by this Act that the right of suing upon the contract under a Bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the Indorser. They entertain no doubt that in the present case the legal title was

(1) 6 H. & N. 637. (2) 30 L. J. (Ex.) 259.

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transferred to, and vested in, the Plaintiffs, and that the subordinate right under the contract was transferred to them by the Statute.

The Plaintiffs have brought their suit for non-performance of the contract stated in the Bills of lading. There were six parcels of goods, each consisting of 500 bags of linseed-cake; there was a separate Bill of lading for each parcel. They are all in the same form, containing an acknowledgment of having received each parcel "in good order and well conditioned, and an undertaking to deliver them in like good order and condition at the port of *London*, the dangers of the Seas only excepted."

It was not disputed that the goods, for the damage to which the suit was brought, were not delivered in the order and condition in which they were shipped. But the question raised by the answer of the Defendants is, whether this default was caused either by "the dangers of the Seas," or by "the natural qualities of the Oil-cake"? The *onus* of proving either branch of this defence lay upon the Defendants.

The former is founded on the express stipulation in the contract; the latter, on the implication of law. It would be unreasonable to make the Shipowners responsible for deterioration or damage caused by latent imperfection or defects in the Oil-cake, which could not be supposed to have been known to them at the time of the shipment. It was properly observed by Mr. Justice *Neilson*, in delivering the judgment of the Court in the American case, *Clark* v. *Barnwell* (1), cited in the argument, "that the acknowledgment in the Bill of lading can only mean that, as far as they had an opportunity of judging, the goods were sent in a perfectly good condition." The Defendants in this suit were not precluded from shewing (if they could) that the damaged Oil-cake was imperfectly manufactured or insufficiently prepared for the voyage; or that it had some intrinsic defect, at the time of shipment, which caused the damage. A notice was served upon the Defendants, on the part of the Plaintiffs, before sending out a commission to *America* to take evidence on the subject. Having considered the evidence that was taken there, as well as that which was given in the Court of Admiralty, their Lordships are satisfied that the Oil-cake was in

(1) 12 Howard, 272.

good order and well-conditioned at the time of shipment. This disposes of one branch of the defence.

The learned Judge of the Court of Admiralty came to the conclusion upon the evidence, especially that of Dr. *Letheby*, that the damage complained of was mainly caused by the bones that formed part of the cargo. But at the same time he held that it was not necessary to found his judgment upon this, inasmuch as the *onus* was on the Defendants to shew, and that they had not shewn, that this damage was caused by "dangers of the Seas."

Their Lordships are not prepared to say what may have been the actual or the relative effect of the bones, considered as a distinct item in the combination of concurrent causes which led to and resulted in the damage to the oil-cake. The cargo was made up (amongst other things) of Beef and Pork below, and a large number of bags of Oil-cake, some below and some above; Clover seed behind; Bones in the forehold, loose and in bulk, about three feet from the Oil-cake; a portion strewed about the bags of Oil-cake, and some amongst Tobacco. Every place was filled up, so that no space was left in which any part of the cargo could be put. One of the Witnesses for the Defendants was asked his opinion as to the stowage with reference to allowing the air to circulate. His answer was—"I did not fancy she could have been stowed better. The Ship was as full as she could possibly be stowed." That is to say, she was well stowed in the sense of being well crammed and closely packed; but (as the result shewed) so as to prevent the circulation of air. At a subsequent stage, when there was no ventilation, and no outlet was left for heat and damp to escape, the Bones may have gradually contributed to taint the atmosphere. That in such circumstances the Oil-cake would be liable to become mouldy, is stated by competent Witnesses on both sides. It is difficult, if not impracticable, to come to any satisfactory conclusion as to the relative effect of each of the concurrent causes that by their combination brought about the proximate cause of the damage. Causes minute in themselves may be intensified in combination with others.

The words in the Bills of lading—"dangers of the Seas"—must, of course, be taken in the sense in which they are used in a Policy of Insurance. It is a settled rule of the Law of Insurance,

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not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss. In the present case, the remote causes are not only distinct from the proximate cause, but they are, for the most part, unconnected with dangers of the Seas.

If a Shipowner undertakes to convey such a cargo, under the ordinary contract set forth in the Bills of lading, he takes upon himself the risk of consequences and contingencies other than those which are within the express exception, or that which is implied by law. The question here is not one of negligence, but of breach of contract, as explained in the judgment delivered by Sir *John Patteson* in *Tronson* v. *Dent* (1).

The extent of sea damage done to some other parts of the cargo, so far as it was distinctly proved, was but limited, and the indirect effect of this damage is but a matter of conjecture. Some of the principal Witnesses for the Defendants (including the Master) do not notice it at all, and some allude to it, without relying much upon it. As to the closing of the Hatches, the Master assents to the suggestion made to him, that this may have had a share in causing the damage to the oil-cake, but he does not put it forward in the first instance. During the early part of the voyage (he says) he occasionally kept the hatches open, but during the last two-thirds of the voyage, the weather was so tempestuous that he was under the necessity of closing them. He has not stated at what date this necessity arose, nor (except in this vague form) for what periods it continued. The Log was not referred to; he did not make a protest after arrival at the port of *London*. The necessity must have ceased for some considerable period before the Hatches were opened, on the third day after arrival, when there was such a rush of steam and heat as plainly indicated the absence of any means of escape for the confined and vitiated air during the time that the hatches were closed. One of the witnesses for the Defendants says he thought it would have exploded the decks.

Their Lordships have been referred to the surveys and reports that were given in evidence, and have considered all the evidence relating thereto.

(1) 8 Moore's P. C. Cases, 433.

They are of opinion, that the conclusion proper to be drawn from the evidence is this, that from the nature and collocation of this cargo of animal, vegetable, and (to some extent) putrescible matter, sea damage was done to a portion of the cargo; that by the packing and cramming of the Ship so as to prevent any circulation of air, and the closing of the hatches, the atmosphere in the Ship's hold became heated, damp, and vitiated, without means of escape; and that this atmosphere was the proximate cause of the damage to the Oil-cake, which is the subject of this suit. This proximate cause cannot be brought within the legal import of the exception of dangers of the Seas.

In the American case that was referred to, it is said that where the Defendants have brought their case within an exception in the contract, this shifts the *onus* upon the Plaintiffs, to prove that the damage might have been provided against and prevented by reasonable care and skill on the part of the Shipowners. But in order to make this applicable, the Defendants should first have given sufficient evidence to bring their case (*primâ facie* at least) within such an exception. Their Lordships think, that they have failed to do so in the present case. The simple truth is, that they did not make provision sufficient to enable them to fulfil their contract. They ought to have known that there were portions of the cargo which if deprived of ventilation, without circulation of air and without an outlet for heated, damp, or vitiated air to escape,—the result would be, in the natural course of things, that that portion of the cargo which consisted of Oil-cake would be damaged. As they did not in fact provide sufficiently against such a natural, if not necessary, consequence, they imposed upon themselves the disability to fulfil the express contract into which they had entered under the Bills of lading. In this view it is not material to the Plaintiffs, whether the Defendants are or are not chargeable with neglect, default, or improvidence. It is enough for the Plaintiffs to have established that the Defendants have not performed their contract, and have not sustained either of the defences which they have pleaded as a legal excuse for non-performance. In this conclusion their Lordships agree with the learned Judge of the Court of Admiralty. There was another part of the case, but of minor importance, as to the expenses incurred in the sorting and

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weighing, etc., in consequence of the state in which the goods were delivered and the mode of delivery. Whatever these expenses were, they will be ascertained and allowed by the proper Officer of the Admiralty Court, and it is not necessary to give any further direction. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed, and that the appeal be dismissed with costs (1).

Solicitor for Appellants: *T. Cooper.*
Solicitors for Respondents: *Thomas & Hollams.*

(1) It appears from the American authorities, that if goods are damaged by actual contact with Sea-water, the Underwriters are liable, and it has been held, that if part of the cargo is damaged by Sea-water, and the vapour and gases arising from it injure another portion of the cargo which is insured, the Underwriters on the latter portion are liable, although the damage was not caused by immediately coming in contact with the Sea-water: See *Parsons* on Marine Insurance, Vol. I., p. 546, citing the case of *Baker* v. *Manuf. Ins. Co.*, 12 Gray, 603; *Cogswell* v. *Ocean Ins. Co.*, 18 La. 84. See also 1 *Phillips*, Law of Insurance, sec. 1099, pp. 627, 635.

HENRY HEBBERT, *heretofore* CHARLES JAMES ELPHINSTONE . . . . . } APPELLANT;

AND

THE REV. JOHN PURCHAS, CLERK . . . . RESPONDENT.

J. C.*
1870
Nov. 16, 17, 18, 19, 21.
1871
Feb. 23; *March* 25; *April* 26.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Rubrics in Prayer Book, construction of—Vestments—Chasuble—Alb—Tunicle—Biretta—Surplice—Mixed chalice—Wafer Bread—Position of Celebrant while consecrating the Elements.

Construction of the Notice termed 'The Ornaments-Rubric' prefixed to 'The Order for Morning and Evening Prayer,' which provides "*That such Ornaments of the Church, and of the Ministers thereof, at all Times of their Ministration, shall be retained, and be in use, as were in this Church of England, by the Authority of Parliament, in the Second Year of the Reign of King Edward the Sixth;*" and of the Rubric prefixed to 'The Order of the Administration of the Lord's Supper, or Holy Communion, which describes "*the Priest standing at the North side of the Table,*" with that which precedes the 'Prayer of Consecration,' and enjoins "*When the Priest, standing before the Table, hath so ordered the Bread and Wine, that he may with more readiness and decency break the Bread before the People, and take the Cup into his hands, he shall say the Prayer of Consecration,*" as well as that appended to the same Service regarding the sacred Elements; and of the Rubric appended to the service for the Holy Communion; that "*To take away all occasion of dissension, and superstition, which any person hath or might have concerning the Bread and Wine, it shall suffice that the Bread be such as is usual to be eaten; but the best and purest Wheat Bread that conveniently may be gotten.*"

First, as regards the Vestments of the Minister whilst officiating in the administration of the Holy Communion, or in other Ministrations, the 'Ornaments-Rubric,' as explained by the Injunctions of Queen *Elizabeth*, A.D. 1559, and the Advertisements of *Elizabeth*, A.D. 1564, made pursuant to the *Act of Uniformity*, 1 Eliz. c. 2, and explained by subsequent Visitation Articles; when construed with the Canons of 1603–4, and the *Act of Uniformity*, 13 & 14 Car. 2, c. 4; does not permit the use by the Minister while officiating at the Holy Communion of the *Chasuble*, the *Alb*, or the *Tunicle*, but allows of the *Cope* being worn in ministering the Holy Communion on High feast days, in Cathedrals and Collegiate Churches, and requires the use of the *Surplice* in all other Ministrations. The use of the *Chasuble*, *Alb*, and *Tunicle* by the Celebrant while officiating in the Communion Service, is illegal.

Second, the Rubrics regarding the position of the Minister during the

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), THE BISHOP OF LONDON (DR. JACKSON), and LORD CHELMSFORD.

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Communion Service designate the North side of the Communion Table as the proper place for the Minister throughout the Communion Service, and, also, whilst reading the Prayer of Consecration, his proper position therefore is, on the North side, or the North end of the Table, if it is placed east and west, facing the south, and not at that part of the west side of the Table which is nearest to the north; the object being that the People may see him break the Bread and take the Cup into his hands, which they cannot do if he stand with his back to the People, and between the People and the Holy Table.

Third, the Rubric regarding the Elements requires that the Bread to be used at the Holy Communion be pure Wheaten Bread, as is directed by the Canons of 1603–4, and not Wafer Bread, which is illegal; and does not allow the administering of Wine mixed with Water, instead of Wine only, to the Communicants at the Lord's Supper: whether the Water be mingled with Wine before or during the Communion Service.

Semble, the use of a *Biretta*, or Cap, as a vestment in the Service of the Church is illegal.

Semble, the provisions of the Canons of 1603–4 and Prayer Book must be read together, as far as possible, and the Canons 17, 25, and 58, upon the vestments of the Ministers are an exposition and limitation of the 'Ornaments-Rubric.' Such Ornaments are to be limited, as to the Vestments, by the special provision of the Canons themselves, which were not repealed by the *Act of Uniformity*, 13 & 14 Car. 2, c. 4.

The cases of *Westerton* v. *Liddell* (1) and *Martin* v. *Mackonochie* (2) considered and confirmed.

THIS appeal was brought from a sentence of the Arches Court of *Canterbury*, in a cause of the Office of the Judge, originally promoted by *Charles James Elphinstone* against the Respondent, the Rev. *John Purchas*, a Clerk in Holy Orders of the United Church of *England* and *Ireland*, the perpetual Curate of the Church or Chapel of *Saint James*, at *Brighton*, in the County of *Sussex*.

After the institution of the appeal *Elphinstone* died, and the Appellant, *Hebbert*, was substituted as Promoter in his place (3).

The cause was promoted in the Arches Court, by virtue of Letters of Request, by the late Lord Bishop of *Chichester*, in accordance with the provisions of the *Church Discipline Act*, 3 & 4 Vict. c. 86.

No appearance was given to the Citation by *Purchas*, and the proceedings were carried on in default.

By the Articles admitted in the cause, *Purchas* was charged with having offended against the Laws Ecclesiastical by using and sanctioning the use of certain rites, ceremonies, acts, observances,

(1) Special Report of the cases of *Westerton* v. *Liddell* and *Beal* v. *Liddell*, by E. F. Moore, 8vo. Lond. 1857.

(2) Law Rep. 2 P. C. 365.

(3) See case reported on this point, *ante*, p. 245.

matters, and things in the course of, and in connection with, the performance of Divine Service in his Church.

On the 3rd of February, 1870, the Judge of the Arches Court, (The Right Hon. Sir *Robert Phillimore*), by an Interlocutory decree, pronounced that *Purchas* had offended against the Statute Law, and the Constitutions and Canons Ecclesiastical of the Realm, in having, during Divine Service in his Church, used and worn, and authorized to be used and worn, certain Vestments, and observed and authorized to be observed rites and ceremonies, and read and authorized to be read Prayers, and done and authorized to be done other acts not prescribed by the Rubrics or Formularies of the United Church of *England* and *Ireland*, and admonished him to abstain from the use of, or sanctioning the use of, the rites, ceremonies, acts, observances, matters or things in which he had so offended, and decreed a Monition to issue accordingly, and further condemned him in the costs, excepting the costs of such Articles as had not been sufficiently proved (1).

The present appeal was from this decree so far and inasmuch as the Judge omitted or declined to pronounce that *Purchas* had offended against the Statute Law and the Constitutions and Canons Ecclesiastical, first, by administering Wine mixed with Water, instead of Wine, to the Communicants at the Lord's Supper, as pleaded in the sixteenth Article; second, by standing with his back to the People, between the People and the Holy Table, whilst reading the Prayer of Consecration in the Holy Communion, in such wise as pleaded in the seventeenth Article; third, by the use of Wafer Bread, instead of Bread such as is usual to be eaten, in the administration of the Holy Communion, as pleaded in the twentieth Article; fourth, by causing Holy Water, or Water previously blessed or consecrated, to be poured into divers receptacles for the same in the said Church, in order that the same might be used by Persons of the Congregation, or by causing and permitting the same to be used by others, as pleaded in the twenty-fifth Article; fifth, by himself wearing, and sanctioning and authorizing the wearing by other officiating Ministers, whilst

(1) See the case *nom. Elphinstone* v. *Purchas* (Law Rep. 3 A. & E. p. 66), which report sets out all the Articles admitted in the cause; being thirty-eight in number, as pleaded and amended, except the formal ones.

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officiating in the Communion Service, and in the administration of the Holy Communion in the Church, a Vestment called a *Chasuble*, as pleaded in the thirty-sixth Article; sixth, by himself wearing, and causing or suffering to be worn by other officiating Clergy, when officiating in the Communion Service in the Church, a certain Vestment called an *Alb*, instead of a *Surplice;* seventh, by causing or suffering to be worn by the officiating Clergy, when officiating in the Communion Service in the said Church, certain other Vestments, called *Tunics* or *Tunicles;* eighth, by himself wearing, carrying, or causing or suffering other officiating Clergy in the said Church to wear, or bear in their hand, a certain Cap called a *Biretta*, during Divine Service, as pleaded in the thirty-eighth Article; and had also omitted or declined to admonish him against offending in future in the said matters complained of; and also omitted or declined to condemn him in the costs incurred by *Elphinstone* in respect of such matters.

An appearance under protest was given by *Purchas*, on the occasion of the motion in the appeal to substitute *Hebbert* as the Promoter of the Office of the Judge in the place and stead of *Elphinstone*, and Counsel appeared on behalf of *Purchas* and opposed the motion. Such appearance, however, was afterwards withdrawn, and notice filed, to the effect, that *Purchas* proceeded no further in the appeal.

As the Respondent did not appear the appeal was heard *ex parte*.

Mr. *A. J. Stephens*, Q.C., and Dr. *Tristram* (with them Mr. *T. D. Archibald*, and Mr. *B. Shaw*), for the Appellant:—

This appeal is confined to that part of the judgment of the learned Dean of the Arches which allowed the use, and thereby declared the legality of, a Mixed Chalice and Wafer Bread at the Holy Communion, and declared the position of the Officiating Minister with his back to the People when consecrating the Elements, not to be illegal or contrary to the Rubrics; which allowed also, the use by the Officiating Ministers, as well as by the Congregation, of Water previously blessed or consecrated; and which declared the use of certain Vestments other than the Surplice, to be legal, and allowable by the Acts of Uniformity, and the Canons and Constitutions Ecclesiastical, and also refused costs.

It will be most convenient to take the question on the Vestments first. By the 36th Article, the Respondent is charged on certain days therein specified, with himself using and wearing, and causing or suffering to be worn by other Clergy whilst officiating in the Communion Service, and in the administration of the Holy Communion in his Church, a Vestment called a "*Chasuble*," and by the 38th Article he is charged with wearing, or permitting to be worn, in like manner and at the like times, a Vestment called an "*Alb*;" and other Vestments called "*Tunics*" or "*Tunicles*," and with wearing, carrying in his hand, or permitting other Officiating Clergy so to do, a certain Cap, called a "*Biretta*." The Vestments against which these Articles of charge are directed are, therefore, a "*Chasuble*," an "*Alb*," "*Tunics*" or "*Tunicles*," and a "*Biretta*." Now, the authority which is invoked for the use of these Vestments is the latter part of the Rubric Notice in the Book of Common Prayer, at the beginning of the Order for Morning and Evening Prayer, which is in the following words: "And here is to be noted that such Ornaments of the Church, and of the Ministers thereof, at all Times of their Ministration, shall be retained and be in use, as were in this Church of *England*, by the Authority of Parliament, in the Second Year of the Reign of King *Edward* the Sixth." A Rubric which, as we shall show presently, was substituted at the last revision of the Prayer Book in 1662 for that contained in the previous Prayer Books of *Edward* VI., A.D. 1552, of *Elizabeth*, A.D. 1559, and of *James* I., A.D. 1604, each of which Rubrics was in substitution of the fourth Rubric preceding the Service of "The Supper of the Lord and the Holy Communion commonly called the Mass:" in the first Prayer Book of *Edward* VI., A.D. 1549—the fourth paragraph of which is in these words: "Upon the day and at the time appointed for the ministration of the Holy Communion, the Priest that shall execute the Holy ministry shall put upon him the vesture appointed for that ministration, that is to say: a white Alb plain, with a Vestment or Cope. And where there be many Priests or Deacons, there so many shall be ready to help the Priest, in the ministration as shall be requisite: and shall have upon them likewise the vestures appointed for their ministry, that is to say, Albs with Tunicles." And the Rubric at the end of the same service, which

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provides for saying the Litany on Wednesdays and Fridays, contained these directions: "And though there be none to communicate with the Priest, yet these days (after the Litany ended) the Priest shall put upon him a plain Albe or Surplice with a Cope, and say all things at the Altar (appointed to be said at the celebration of the Lord's Supper) until after the Offertory." And in the explanation "of Ceremonies, why some should be abolished and some retained," at the end of the same Book, and under the title of "Certain Notes for the more plain explication and decent Ministration of things contained in this Book," the following directions are given: "In the saying or singing of Matins and Evensong, baptizing and burying, the Minister in Parish Churches, and Chapels annexed to the same, shall use a Surplice: and in all Cathedral Churches and Colleges, the Archdeacons, Deans, Provosts, Masters, Prebendaries, and Fellows being Graduates, may use in the quire, beside their Surplices, such Hoods as pertaineth to their several degrees which they have taken in any University within this realm: but in all other places, every Minister shall be at liberty to use any Surplice or no. It is also seemly, that Graduates, when they do preach, shall use such Hoods as pertaineth to their several degrees. And wheresoever the Bishop shall celebrate the Holy Communion in the Church, or execute any other public ministration, he shall have upon him, besides his Rochette, a Surplice or Albe, and a Cope or Vestment, and also his Pastoral Staff in his hand, or else borne or holden by his Chaplain." The Vestures thus appointed to be used by the Ministry in this first Prayer Book of *Edward* VI., A. D. 1549, were thus eight in number, namely, the *Vestment*, the *Tunic* or *Tunicle*, the *Alb*, the *Cope*, the *Surplice*, the *Hood*, the *Rochette*, and the *Pastoral Staff*. The *Chasuble* is not named, but that, as we shall presently shew, is the same as the Vestment.

This First Prayer Book of *Edward* VI. was completed in 1548, and established in the same year by the *Act of Uniformity*, 2 & 3 Edw. 6, c. 1, and which commanded it to be used on and after the feast of Pentecost then next ensuing, which was the 9th day of June, 1549, under severe penalties which were there enacted, and extended to the depraving of the Book, of which the Courts Civil as well as Ecclesiastical were to have jurisdiction. It is matter of

history, and the particulars of the controversy are alluded to by all Church Historians, that disputes arose very soon after the promulgation of this Prayer Book upon the very question of Vestments that we are now discussing. *Hooper*, who was nominated to the See of *Gloucester*, refused to comply with the Rubric regarding the difference of Vestments for the several services of the Church; and that controversy was one of the causes for the preparation and publication of the Second Prayer Book of *Edward* VI., which was put forth in the year 1552, *Strype*, vol. i.; *Heylin*, Hist. Ref.; *Burnet*, Hist. Ref.; *Collier*, Church Hist., and which contained material alterations and omissions; thus, instead of "An Order for Matins daily throughout the year" prefixed to that service, the heading was, "The Order where Morning and Evening Prayer shall be used and said;" and the Rubric, after providing for the place in the Church or Chapel in which the Morning and Evening Prayer was to be used, which if there was any controversy was to be settled by the Ordinary, proceeded thus: "And here is to be noted that the Minister at the time of the Communion, and at all other times in his ministration, shall use neither Albe, Vestment, nor Cope; but being Archbishop, or Bishop, he shall have and wear a Rochet; and being a Priest or Deacon, he shall have and wear a Surplice only." The Rubric regarding the Vestments prefixed to the Communion Service in the previous Prayer Book, which was there called the Mass, was entirely omitted, as also the directions for the dress of the Minister, when saying the Litany on Wednesdays and Fridays, at the end of that Service.

There were some other alterations in the Rubric after the Communion Service, respecting the Bread and Wine to be used in the administration of the Holy Communion, to which the attention of the Court will be called presently. Now, the second Prayer Book of *Edward* VI. was, like the former, established by Act of Parliament, the 5 & 6 Edw. 6, c. 1, intituled "An Act for the Uniformity of Service and Administration of Sacraments throughout the realm." This Act, after reciting, in section 1, that "there hath been a very Godly Order set forth by the authority of Parliament, for Common Prayer and Administration of the Sacraments," and referring to the Order of service then in use, proceeded in section 5 thus, "and because there hath arisen in the use and exercise of the aforesaid Common Service in

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the Church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the Minister and Mistakers, than of any other worthy cause; therefore, as well for the more plain and manifest explanation hereof, as for the more perfection of the said Order of Common Service, in some places where it is necessary to make the same Prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of Almighty God; the King's most Excellent Majesty, with the assent of the Lords and Commons, in this present Parliament assembled, and by authority of the same, hath caused the aforesaid Order of Common Service, intituled '*The Book of Common Prayer*,' to be faithfully and Godly perused, explained, and made fully perfect, and by the aforesaid authority hath annexed and joined it, so explained and perfected, to this present Statute: Adding also a Form and Manner of making and consecrating of Archbishops, Bishops, Priests, and Deacons, to be of like force, authority, and value, as the same like foresaid Book, intituled '*The Book of Common Prayer*,' was before, and to be accepted, received, used and esteemed, in like sort and manner, and with the same clauses of provisions and exceptions, to all intents, constructions, and purposes, as by the Act of Parliament made in the second year of the King's Majesty's reign (2 & 3 Edw. 6, c. 1) was ordained, limited, expressed, and appointed for the Uniformity of Service and Administration of the Sacraments throughout the Realm, upon such several pains as in the said Act of Parliament is expressed. And the said former Act to stand in full force and strength, to all intents and constructions, and to be applied, practised, and put in Use, to and for establishing the Book of Common Prayer now explained and hereunto annexed, and also the said Form of making of Archbishops, Bishops, Priests, and Deacons hereunto annexed, as it was for the former Book." By this Act, therefore, the second Prayer Book of *Edward* VI., with its omissions, alterations, and additional services, was established in like manner; but in lieu of the first, the conformity to, and observance of which, was to be enforced with the same penalties and under the same authority as were provided for the enforcement of the first Book by the previous Statute, 2 & 3 Edw. 6, c. 1, which for that purpose was declared to stand "in full force and strength."

Here, then, were two Acts of Parliament, both bearing the same title, viz. "An Act for the Uniformity of the Service and Administration of the Sacraments throughout the realm," and each sanctioning and enforcing by penalties the use of a "Book of Common Prayer," which Book, though modified and materially altered, as well in form as in substance, as established by the latter Act, was declared to be in Use and to be enforced by the machinery and penalties of the former Act. To this extent, therefore, these Statutes were *in pari materiâ*, and must be taken and construed together: *Anon.* (1); *Doe* d. *Tennyson* v. *Lord Yarborough* (2); *Reg.* v. *Palmer* (3); *Ex parte Carruthers* (4); *Dwarris* on Statutes, pp. 568-9 [Ed. 1848)]. Nothing, therefore, can be clearer than that the Vestments ordered and allowed by this second Prayer Book were those which were legalized by the Statute which established that Book, and enforced its observance by the penalties of the previous Act. These were, in the Ministrations of the Church, for an Archbishop or Bishop, a Rochette; and for a Priest or Deacon, a Surplice. The *Chasuble*, the *Alb*, the *Cope*, the *Tunic*, and the *Biretta*, of which we complain, were abrogated and became illegal. This is the more important, and the reason of it will become more apparent, when we come to consider the nature of these Garments, all of which were used by the Priest in the Roman Catholic Church. The *Chasuble*, or, as it is also called, the *Vestment*, is the upper or last vestment put on by the Priest before celebrating mass: *Pugin*, Gloss. 'Ecc. Ornaments,' p. 58. The *Alb* is the second vestment put on by the Priest in preparing for the celebration of the Mass: *Ib.* p. 5; and *Rock's Hierur.* p. 424. The *Tunic*, or *Dalmatic*, is the peculiar vestment used by Deacons and Subdeacons at High Mass: *Pugin*, Gloss. 'Ecc. Orn.' pp. 103-5; *Rock's Hierur.* p. 451; *Rock's* Church of our Fathers, vol. i. pp. 372-3, and 383. And the *Cope* is a vestment worn in solemn processions, principally at Vespers and during the celebration of Mass, by some of the assistant Clergy: *Pugin's* Gloss. 'Eccl. Orn.' p. 73; *Rock's Hierur.* p. 454. Now, the service of the Mass being, from the earliest time of the Roman Catholic Church, considered and held to be a sacrifice, the garments especially ordered

(1) Capel Lofft, 398.
(2) 7 B. Moore, 258; S. C. 1 Bing. 24.
(3) Leach, C. C. 352, 355; S. C. 2 East, P. C. 893.
(4) 9 East, 44.

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by the Romish Church to be used at its celebration were sacrificial garments; each of them had a peculiar and symbolical meaning, and each was held necessary, as part of the apparel of the Minister, for the due celebration of that rite as implying the doctrine of a Sacrifice. It is important to remark, that it is in that light, and viewing the service in our Church of the Holy Communion as a Sacrifice, that the Ritualists consider the use of the *Chasuble* as implying a belief in the doctrine of an Eucharistic Sacrifice: Rit. Comm., First Rep., pp. 16 and 72; Quest. and Answ. 496-7-8-9; 2604-5-6-7-8-9-10. But if such a character of the service was partially retained by the first Prayer Book of *Edward* VI., it was entirely excluded by the second Prayer Book, which, besides abolishing the dresses peculiar to the service as an Eucharistic Sacrifice, abolished the name of the Mass altogether, and termed what was before called the Altar, the Lord's Table, and "God's Board" and "Holy Table," thus destroying, with the title and adjuncts of the Service, the very name of that upon which alone a sacrifice could be said to be offered: *Westerton* v. *Liddell* (1); whilst for all these Sacrificial Garments was substituted, as regarded the Priest or Deacon, at whatever service he officiated, "a Surplice only." Both these Statutes of *Edward* VI. were, as is well known, repealed *seriatim* by 1 Mary, sess. 2, c. 2, and the Prayer Book established by them became a dead letter; the service of the Church being by that Statute directed to be performed as was used in the last year of the reign of *Henry* VIII., and the Mass restored by 1 Mary, sess. 2, c. iii. Upon the accession of *Elizabeth*, in the first year of her reign, an Act, 1 Eliz. c. 2, was passed, entitled "An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments." This Act declaring, "Where at the death of our late Sovereign Lord King *Edward* VI. there remained one uniform Order of Common Service and Prayer, and of the Administration of Sacraments, Rites, and Ceremonies in the Church of *England*, which was set forth in one Book, intituled The Book of Common Prayer and Administration of Sacraments, and other Rites and Ceremonies in the Church of *England* authorized by Act of Parliament holden in the 5 & 6 Edw. 6, intituled, &c., the which was repealed and taken away by the Act

(1) Moore's Special Rep. p. 180–1.

1 Mary, sess. 2, to the great decay of the due honour of God, and discomfort to the Professors of the truth of Christ's Religion;" enacted, by sect. 2, "That the said Statute of Repeal, and everything therein contained, only concerning the said *Book*, and the Service, Administration of the Sacraments, Rites, and Ceremonies, contained or appointed in or by the said *Book*, shall be void and of none effect from and after the Feast of the Nativity of St. *John* Baptist next coming; and that the said Book, with the Order of Service, and of the Administration of Sacraments, Rites, and Ceremonies, with the alterations and additions therein added and appointed by this Statute, shall stand and be, from and after the said Feast of the Nativity of St. *John* Baptist, in full force and effect, according to the tenor and effect of this Statute"—and it was further enacted, by sect. 3, That all and singular Ministers in any Cathedral or Parish Church, &c., should, after the day above-mentioned, be "bounden to say and use the Mattens, Even-song, Celebration of the Lord's Supper, and Administration of each of the Sacraments, and all the Common and open Prayer, in such order and form as is mentioned in the said *Book*, so authorized by Parliament in the said 5th and 6th years of the reign of King *Edward* VI., with one alteration or addition of certain Lessons to be used on every Sunday in the year, and the form of the Litany altered and corrected, and two sentences only added in the delivery of the Sacrament to the Communicants, and none other or otherwise." Now, the effect of this repeal of the Statute of the 1 *Mary*, sess. 2, was the revival of the two *Acts of Uniformity* of *Edward* VI., the 2 & 3, c. 1, and the 5 & 6, c. 1, though the latter only was mentioned in *Elizabeth's* Statute, and the Prayer Book set forth and authorized by the 5 & 6 Edw. 6, was re-established in its full integrity, with only the slight alterations in the Lessons and Litany already alluded to; yet if, as before stated, it was intended by the 5 & 6 Edw. 6, c. 1, to retain the penalties enacted by the 2 & 3 Edw. 6 for the enforcement of the first Prayer Book, to support and enforce the second Prayer Book, and that for that purpose the second Statute of *Edward* VI. was in *pari materiâ* with the first Statute of *Edward* VI., that object ceased to be any longer necessary, and was not provided for, for the Statute of *Elizabeth* proceeded to re-enact, and gave authority to enforce, exactly the same penalties against the use of any other

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service than that thereby established, namely, the second Prayer Book of *Edward* VI., following throughout the various clauses for giving effect to such enactments, the very words of the Statute, 2 & 3 Edw. 6, c. 1, for imposing and enforcing the first Prayer Book. Thus far, therefore, the Act of *Elizabeth* revived the 2 & 3 as well as the 5 & 6, Edw. 6 with the alterations and extensions before referred to; but the Act of *Elizabeth* contained in its 25th section this proviso: "Provided always, and be it enacted, that such Ornaments of the Church and of the Ministers thereof, shall be retained, and be in use, as was in this Church of *England* by authority of Parliament in the second year of the reign of King *Edward* the Sixth, until other order shall be therein taken by authority of the Queen's Majesty, with the advice of her Commissioners appointed and authorized under the Great Seal of *England* for Causes Ecclesiastical, or of the Metropolitan of this Realm."

Now, though it is upon the enactments of this section that all the difficulties and controversy regarding the proper Vestments of the Ministry have arisen, and are now maintained; yet it is worthy of particular observation, that the Rubric which was framed on this section, in *Elizabeth's* Prayer Book of 1559, contained a special reference, not to the Statute of 2 & 3 Edw. 6, c. 1, and "the Ornaments of the Church and Ministers thereof" as were then in use, and were sanctioned by that Act; but to "such ornaments in the Church as were in use by authority of Parliament in the 2 Edw. 6, according to *the Act of Parliament set in the beginning of this Book*;" which was this very Act, 1 Eliz. c. 2, which enacted the second Prayer Book of Edw. VI. and enforced its observance with the severest penalties. In the Prayer Book of 1662, which contains the Ornaments-Rubric, this reference to the Act of *Elizabeth* is omitted, and this has occasioned the whole controversy, on the revival of the first Statute of Edw. VI. The Rubric being, however, thus retained, though slightly modified, as we shall see hereafter, is now part and parcel of the Prayer Book, and being framed upon, and in the words of the Proviso in the Statute of *Elizabeth*, it becomes necessary to examine carefully that Proviso; and the first question is, what is its nature and what its effect? Is it a saving clause? that is, an exemption of some special thing,

as the Ornaments of the Church and Ministers, out of the general things mentioned in the Statute. But the proper Ornaments of the Church and Ministers are, as we have shewn, expressly and positively declared and provided for in the Rubrics of the Second Prayer Book, established as well by the Statute, 5 & 6 Edw. 6, c. 1, as by this Act of 1 Eliz. c. 2; to set up those, therefore, which were in use by authority of Parliament in the second of Edw. VI., which could only be, and are so taken to be, those maintained by the First Prayer Book of Edw. VI. and the Act authorizing its use, involves the repeal of all the Rubrics and provisions relating to Ornaments in the second Prayer Book, and to the re-enactment of the Rubrics contained in the first Prayer Book, which Book is suppressed and superseded, and the use of it made penal, as well by the Statute, 5 & 6 Edw. 6, c. 1, s. 6, as that of *Elizabeth*, which we are now discussing. The result is, that if this proviso is to be taken as a saving clause, such a saving clause, being directly repugnant to the purview and body of the Statute in which it occurs, rendering such Statute inconsistent and destructive of itself, ought, by the acknowledged rule for the construction of Statutes, to be rejected: *Dwarris* on Statutes, p. 513 [2nd Ed.], citing *Hollewell* v. *Corporation of Bridgewater* (1), *Walsingham's Case* (2), and *The Case of Alton Woods* (3). So, also, if it be a proviso, being repugnant to the purview of the Statute in which it stands, it is equally nugatory and void as a repugnant saving clause: *Attorney-General* v. *Governor of the Chelsea Waterworks* (4); *Bac.* Abr., tit. "Statute," (I.) 2; *Dwarris* on Statutes, p. 515. The origin of the proviso may perhaps be traced, from the history of the times, to the inclination of Queen *Elizabeth* to continue the use of the *Cope*, which was a gorgeous Vestment, and, though used at the Mass, not considered strictly a sacrificial Vestment. This appears from the proceedings of the Commission that was appointed to review the two Books of Common Prayer, immediately on the accession of the Queen, and the correspondence relating thereto: *Cardwell's* Conferences, pp. 18, 19, 24, 48–9; *Strype's* Annals, Pt. 1, p. 120. The difficulty we suggest in its application, and which we contend ought to make it null and void, does not seem, however, to have been felt at the time: *Burnet's* Hist. Ref., vol. v., p. 505; or to

(1) 2 And. 192.
(2) Plowden, 565.
(3) 1 Co. Rep. 47.
(4) Fitzg. 195.

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have occurred to any of the Revisers of the Liturgy since; for the Act of *Elizabeth* then, as now, was appended to the Prayer Book set forth in 1559, and a Rubric embodying the provisions of the clause in question was prefixed to the Order of Morning and Evening Service; and in 1662, at the last revision of the Prayer Book, the Rubric was altered to its present form and place, being taken as before from the Proviso in the Act of *Elizabeth*. Yet we shall shew, as matter of fact and history, that from the promulgation of the *Act of Uniformity* of *Elizabeth* in 1559, down to a very recent period, and notwithstanding the insertion of the Rubric regarding Ornaments in her Prayer Book, such of the Vestments in question as were previous to the Reformation, and still are in the Roman Catholic Church, held to be Sacrificial Vestments, have been totally abandoned by the Ministry of our Church. With the Vestments also, as in the reign of *Edward* VI., Altars were abolished, and all symbols of the Eucharistic Sacrifice of the Mass: *Camden's* Annals, pp. 19, 20; *Strype's* Annals, vol. 1, p. 238–9–41; *Westerton* v. *Liddell* (1); *Parker* v. *Leach* (2).

In this same year (1559) in which Queen *Elizabeth's Act of Uniformity* was passed, and which established the second Prayer Book of *Edward* VI.; and immediately after the passing of that Statute, the Queen's Injunctions were put forth, for, as their preamble stated, "the Suppression of Superstition" and "the extirpation of all hypocrisy, enormities, and abuses." The object of these Injunctions was to explain and enforce the provisions of the *Act of Uniformity*, and they were the authoritative Instructions of the Royal Commissioners, who were sent, in the Summer of that year, into all the Dioceses to make a general Visitation in the Queen's name, and to whom special Articles of Visitation were given, that were framed at the time, and accompanied the Injunctions. The Injunctions are to be found in *Sparrow's* Collection of Canons, p. 67; *Cardwell's* Doc. Ann., vol. i., p. 178 [Ed. 1839], and notes, Ib., and appear to have been framed and prepared by the same Commissioners as had already revised Queen *Elizabeth's* Prayer Book; *Strype*, Ann., vol. iv., Pt. 1, pp. 197, 235; *Burnet*, Hist. Ref., vol. ii., p. 724; *Collier*, Eccl. Hist., vol. ii., p. 433; and to have been issued by the Queen, as well in the exercise of

(1) Moore's Special Rep. p. 181–2. 2) Law Rep. 1 P. C. 312.

her Supreme Ecclesiastical Authority as head of the Church, as by virtue of the powers given to her by the 26th section of the same *Act of Uniformity*: *Parker's* Correspondence, p. 375.

The question now arises, how did these Injunctions deal with the Vestments of the Clergy? In the first place, we find that the twenty-third Injunction ordered the abolishment of all things superstitious, while the thirtieth, regarding the apparel of Ministers, ordered that the Ministers, as well "all Archbishops and Bishops, and all other that be called or admitted to Preaching or Ministry of the Sacraments, or that be admitted into vocation Ecclesiastical, or into any society of learning in either of the Universities, or elsewhere, shall use and wear such seemly habits, garments, and such square caps, as were most commonly and orderly received in the *latter year* of the reign of King *Edward* VI.; not thereby meaning to attribute any holiness or special worthiness to the said garments, but, as *St. Paul* writeth: '*Omnia decenter et secundum ordinem fiant*' 1 Cor. 14 cap." What becomes, then, of the supposed retention of the Ornaments of the Ministry as worn and used in the *first year* of the reign of *Edward* VI., as assumed to be intended and revived by the 25th section of the Act, 1 Eliz., c. 2, even admitting that that section ought to have had at any time due legal operation. That it was the intention of the Injunctions to remove all doubts upon the subject of what were the proper Vestments for the Ministry, is manifest from the interpretation put on them by the Archbishops and Bishops in their Visitations, and the orders for the suppression of all Ornaments, as well of the Church as of the Ministry, which had been in use in Popish times, or had any reference or signification as regards the Mass as a sacrifice. These are abundantly shewn in the contemporaneous Inventories of Church Furniture, and the letters and instructions addressed to the Clergy of the time: *Cardwell*, Doc. Ann., vol. i., pp. 210, 220-1, 225-6, 236-8, 242, 356; *Peacock's* Inventories of Church Furniture, pp. 49, 52, 73, 83, 93-4, 107-8, 113-14, 124, 153-4, 157-8; *Grindal's* Rem., p. 135; *Cardwell*, Conf., p. 50; *Strype's* Ann., vol. i., p. 245; Ib. 251-4. In these Inventories the *Alb* and the *Cope* are continually found, until the complete removal of the Altars had taken place by the substitution of Communion Tables, when Surplices only are men-

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tioned. The Correspondence of Archbishop *Parker* (2 *Collectanea Curiosa*, pp. 274, 296) regarding Popish Books and the *Oxford* Inventories, are a confirmation of the disuse of the prohibited Vestments (Ib., pp. 264-8, 280-1). The recognition of these Injunctions, and their intention and effect in carrying out the then recent *Act of Uniformity*, and especially in the abolition of all superstitious and sacrificial Vestments, is further confirmed and illustrated by the Proceedings in the Bishops' Courts: *Surtees* Soc. Publications, vol. xxi., pp. 127, 136, 148, 170. In *Becon's* Works, especially his Catechism, *Parker* Soc. Edit., pp. 299, 300; also *Heylyn's* Hist. of the Refor., p. 314; 1 *Zurich*, Letters, *Par.* Soc. Edit., pp. 43, 72, 73, 142, 206: *Burnet's* Hist. Refor., vol. v., p. 505; 1 *Strype's Parker*, p. 308; App., Ib. p. 70. All these authorities prove that the Sacrificial Vestments were destroyed, and the *Cope* and *Surplice* alone retained, by the force and in the execution of Queen *Elizabeth's Act of Uniformity*. We find, also, that, on the consecration of Archbishop *Parker*, at *Lambeth*, on the 17th of December, 1559, which was the first important ceremony after the passing of Queen *Elizabeth's Act of Uniformity*, the *Surplice* and *Cope* were the only Ecclesiastical Vestments worn, as well by the Archbishop himself as by the Bishops or Priests officiating: *Burnet's* Hist. Refor., vol. v., pp. 553-5; 1 *Strype's Parker*, p. 114.

In 1564, Queen *Elizabeth's* Advertisements were issued, "partly (as their title stated), for the due order in the Public Administration of the Holy Sacrament, and partly for the apparel of all persons Ecclesiastical." They were framed, as stated in the preface appended to them, by the Archbishop and Metropolitan, with other Bishops who were then in the Commission for Causes Ecclesiastical, in pursuance of Letters from the Queen; and were, therefore, in strict accordance with the authority given to Her Majesty by the 25th section of the *Act of Uniformity*, 1 Eliz. c. 2. Their history is to be found in *Strype's Parker*, vol. i. p. 301–2, 314–19, 432–2; *Heylyn's* Hist. Refor. p. 429. The Articles themselves are in *Sparrow's* Coll. of Canons, p. 125, and in *Cardwell's* Doc. Ann. p. 287, [Ed. 1839], and, as regarding the Vestments of the Ministry, contained the following directions:—Item. "In the ministration of the Holy Communion in Cathedral and Collegiate Churches, the principal Minister shall wear a Cope with Gospeller and Epistoler

agreeably, and at all other prayers to be said at the Communion Table to use no *Copes* but Surplices." Item. "That the Dean and Prebendaries wear a Surplice with a silk hood in the Quire, and when they preach to wear their hood." Item. "That every Minister saying any publick prayers, or ministering the Sacraments or other rites of the Church, shall wear a comely Surplice with sleeves, to be provided at the charges of the Parish; and that the Parish provide a decent Table standing on a frame for the Communion Table."

Now that these Advertisements were received and acted on, as authoritative declarations of the Ecclesiastical law, is clear, as well from contemporaneous as subsequent authority. Thus, Archbishop *Parker's* Visitation Articles, issued 1569; the same Archbishop's Articles of 1575; 2 Rep. of Rit. Com., App. pp. 415–16–17–18: 1 *Cardwell's* Doc. Ann. Art. I., p. 320; *Cox's* (Bishop of *Ely*), Injunctions, about 1570–1574, which contained the following:— Item. "That every Parson, Vicar, and Curate, shall use in the time of the celebration of Divine Service to wear a Surplice, prescribed by the Queen's Majesty's Injunctions, and the Book of Common Prayer, and shall keep and observe all other rites and orders prescribed in the same Book of Common Prayer and Injunctions, as well about the celebration of the Sacraments, as also in their comely and Priestlike apparel, to be worn according to the precept set forth in the Book called Advertisements:" Rit. Com. 2nd Rep. p. 406; Archbishop *Whitgift's* Articles, A.D. 1584; 1 *Card.* Doc. Ann. 411–12: 2 *Cardwell's* Doc. Ann. Art. V., p. 6; Bishop of *Bristol's* Articles, 1603, Art. 10, as to the Surplice, and Art. 22 as to the Injunctions and Advertisements; Rit. Com. 2nd Rep., Appx. p. 440: also letter by *Grindel*, Bishop of *London*, A.D. 1566; 2 *Eliz.* State Papers, Domestic Series, vol. xxxix., No. 76; and vol. clxiii., No. 31.

Enough has been said as to the legal recognition and acceptation of these Advertisements. In 1571, certain Constitutions and Canons were agreed to and signed by the Prelates of both Provinces: *Cardwell's Sydonalia,* pp. 111, 115: *Sparrow's* Col. of Canons, pp. 223–227: in one of these the Surplice is expressly alluded to as enjoined and retained by the Queen's Injunctions; and although these Canons of 1571, not having received the Royal assent, were not binding, yet they were generally acted on, and illustrate

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the practice prevailing at the period, and have been so considered in a recent case in this Court: *Westerton* v. *Liddell* (1). The same evidence may be gathered from Archbishop *Whitgift's* account of the Admonition to Parliament: 3 Works, Pref., p. x., p. 459: *Parker* Society's Edition. Again, the authority of the Advertisements is recognised by the XXIVth Canon of 1603: and in Bishop *Juxon's* Articles of Visitation of 1640: Rit. Com. 2 Rep., App. p. 588, Art. 12, p. 589, Art. 3, p. 591. In the Preface to his Edition of the Book of Common Prayer, p. lxxi., Bishop *Mant*, citing *Sharp* on the Rubric, and *Bennet* on the Common Prayer, has given a most valuable gloss upon the Ornaments-Rubric, and the effect of the Advertisements by Queen *Elizabeth;* the passage is too long for citation, but we respectfully refer your Lordships to it, as containing a just and accurate summary of the law, and of the argument we are endeavouring to enforce.

We maintain, therefore, that from their usage, their authoritative recognition, and the frequent reference to them, as well by the Prelates of the Church in their Visitations, Injunctions, and Inquiries, as by the Queen *Elizabeth* herself and her immediate successors, these Advertisements must be presumed and taken to have been duly sanctioned by the Queen, and, together with the Injunctions and Visitation Articles, to be now part and parcel of the Laws Ecclesiastical of the Realm; and, being so, their effect is to render absolutely illegal any use of the *Chasuble*, the *Alb*, or the *Cope*, and to substitute and legalise the use of the Surplice only. That the Surplice was the only recognised legal vestment of the Priest, is further proved by the Injunctions and Visitation Articles, issued by the Archbishops and Bishops in their respective Dioceses, immediately upon, as well as for a long series of years after, the passing of the *Act of Uniformity* of Queen *Elizabeth*, all of which, without exception, are directed against the use of any of the sacrificial Vestments, and enjoin and approve the use of the Surplice only. Those from the years 1561 to 1637, especially illustrate this position, and are to be found, with a Collection extending to A.D. 1730, in the Appendix E. to the 2nd Rep. of the Rit. Com., p. 401 to p. 572. The effect of these Visitation Articles, as interpreting the Acts of Uniformity, both of *Edward* VI. and *Elizabeth*,

(1) Moore's Special Rep., p. 185.

is most material; for the Bishops by both those Acts had authority, with the Civil power, to try offences against the Act, and consequently to declare what those offences were: 2 & 3 Edw. 6, c. 1, sects. 4 and 12, and 1 Eliz. c. 2, sects. 18 and 23, and by their Injunctions and Inquiries to ascertain, by whom and where they were committed: *Cardwell's* Doc. Ann., No. LXXXIII. p. 362; *Strype's Parker*, vol. i., pp. 399, 400.

We come now to the Canons of 1603. Their whole history, and the cause of their being agreed on and established, is to be found in *Cardwell's* Conferences, chaps. III. IV. V. and VI. That at the period of the *Hampton Court* Conference, the 1st year of *James* I., which immediately preceded these Canons, the Surplice was the usual and only garment worn by the Clergy, is manifest from the objection taken by the Puritans to its continuance, no other vestment or garment being so much as named. Its continuance was, however, expressly provided for by the 17th, 25th, and 58th Canons. Surplices are directed to be used and worn, as well by Students in Colleges as by Ministers when reading Divine Service and administering the Sacraments, by the 24th Canon; the Cope is ordered to be worn in Cathedral Churches by those that administer the Communion, and the whole service is to be conducted according to the Advertisements published anno the 7th of Eliz., which are thus expressly recognised as the authority for the use of that Vestment. Again, in the Canons of 1640, though they have been held not to be binding, not having been confirmed by Parliament, the Injunctions and Advertisements of Queen *Elizabeth* are expressly cited (Canon VII.), shewing that at that period also they were recognised as the binding authority of the Church. With reference also to the Vestments in use at that period, the authority for the position we maintain is to be found in the proceedings of the Committees of the House of Lords, appointed in the year 1641, "to take into consideration all innovations in the Church respecting religion:" *Cardwell's* Conf., pp. 238, 270–4; 2 *Neal's* History of the Puritans, pp. 396–397; *Sylvester's* Life of *Baxter*, p. 369; and especially to the discussions and proceedings taken at the *Savoy* Conference, which was held previous to the passing of the *Act of Uniformity* of 1662, 13 & 14 Car. 2, c. 4. The whole proceedings of this Conference are set forth in *Cardwell's*

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Hist. of Conferences, chap. VI. and VII., pp. 238–271; and it appears that exceptions were taken to the Rubric of *Elizabeth's* Prayer Book, regarding the ornaments to be used by the Minister, "Forasmuch as that Rubric seemeth to bring back the *Cope, Albe,* &c., and other Vestments forbidden by the Common Prayer Book of 6 Edw. VI:" *Cardwell's* Conf., p. 334. The result of this objection was, the altering the Rubric of *Elizabeth* to its present form, and the words "such Ornaments of the Church, and of the Ministers thereof, at all times of their Ministration, shall be retained and be in use as were in this Church of *England* by the authority of Parliament in the second year of King *Edward* the Sixth," were substituted, being the very words of the Proviso in *Elizabeth's Act of Uniformity*, with this addition, "at all times of their Ministration," the word "retained" instead of the words "as were in use" being, without doubt, introduced to obviate the objection that Queen *Elizabeth's* Rubric "seemeth to bring back the *Cope, Albe,* &c.," and having reference to the ornaments of the Minister which were in actual use at the time of the enactment of the *Act of Uniformity* in 1662; and which we have shewn excluded all the Sacrificial Vestments, that had ceased to be worn since the year 1559. It appears that the Puritans who took the objection were satisfied with this alteration: 5 *Thorndike,* p. 306. The strict mode in which the *Act of Uniformity* of *Charles* II. was interpreted and carried out is stated by contemporaneous Historians: 1 *Burnett's* History of His Own Times, pp. 335–349; 2 *Clarendon's* Life, p. 139–140, [Oxford Ed., 1827]; the Visitation Articles from 1662 to 1720; Rit. Com. 2nd Rep., App. pp. 601–681. It is important to observe, that in the Rubric of our present Prayer Book, which was enacted by the Statute of *Charles* II., the word used in reference to the Ornaments of the Church and Ministers is "retained," which could only apply to such as were then in use, and would exclude all such as had been abolished by the Injunctions, Visitation Articles, and Advertisements of *Elizabeth,* and by the Canons of *James* I. But the learned Judge below draws an argument from these Advertisements and Visitation Articles which, we submit, has no foundation. He says, "that having reference to the attempt to procure a decent Ritual, the authorities were content to order the minimum of what was requisite for this purpose;" and he refers to the decision in

Westerton v. *Liddell* (1), in regard to the covering of the Communion Table, and the interpretation given to the 82nd Canon, as an illustration of his meaning; and says that such a theory is the gloss which all Ecclesiastical history, contemporaneous as well as subsequent, would give to the Advertisements, &c. We submit, with confidence, that there is no foundation for such a theory: all contemporary history, as we have already shewn, is against the use of any Vestment except the Surplice. The statement respecting the historical gloss is very different, as we apprehend, from the documentary and historical evidence which we have already referred to; the theory is opposed to the whole principle of Uniformity so strongly illustrated in *Martin* v. *Mackonochie* (2). From the time of *Elizabeth* to the present hour, the Statutes of Uniformity, and the manner in which they have been interpreted and enforced, as all the authorities shew, disprove such a theory. *Burnet's* Hist. of his Own Times, vol. i. p. 349–335; *Clarendon's* Life, vol. ii. p. 139–140, all testify to the strict manner in which the *Act of Uniformity* was considered and enforced, and negative such a notion as that suggested by the learned Judge: Articles of Visitation, Rit. Com. 2nd Rep., App., p. 653; 2 *Cardwell's* Doc. Ann., p. 328; *Cardwell's* Conf., p. 390.

The Respondent, though he appeared by Counsel on the motion for the substitution of a Promoter in this appeal, yet now, as on the original hearing in the Arches Court, persisting in refusing to appear, we have no means of ascertaining by what argument or authority he would uphold the practices he has introduced into his Church, or how, if he were represented by Counsel, the authorities and arguments we have cited and urged would be met. We can only conclude, that he would rest on the modern works on the Ritual and its observances: The Tracts for the Times and the *Hierurgia Anglicana*—the latter of which professes to give the history and authority for the use of all the several Vestments complained of; a reference to the Table of contents of the volume is sufficient for each, and when the authorities there referred to are examined, it will be found that they have been misunderstood or misapplied in every single instance, and that there is no authority for saying, that from the time of *Elizabeth* to the date of the

(1) Moore's Special Report, p. 75. (2) Law Rep. 2 P. C. 383.

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publication of that Book in 1843, the *Chasuble*, *Tunicle*, or *Alb* was worn or used in any Cathedral or Parish Church throughout the realm. It now only remains on this part of the argument to urge the illegality of all these Vestments, the *Chasubles*, *Tunics*, or *Tunicles*, and *Albs*, from their total and absolute disuse until revived by the Respondent. We have shewn that all these Vestments were sacrificial Vestments, having, especially, significations with reference to the service of the Mass, at which they were essential. With the abolition of that ceremony by the Statute of 2 & 3 Edw. 6, c. 1, followed the disuse of the Vestments its auxiliaries, and the fact that they have never been revived or in use since the Statute of *Elizabeth*, which revived the previous Statute of 5 & 6 Edw. 6, c. 1, is of itself, as we insist, the strongest proof that could be given, not of their abolition only, but of their illegality. The things the Vestments are symbolical of, no longer form parts of the ceremony of the Lord's Supper or the Creed of the Church: the doctrines of a sacrifice at the Holy Communion, of transubstantiation, and other superstitions, are positively forbidden, and are absolutely illegal, and to authorize the use of the symbols of those doctrines would be to retain the shadow when the substance is gone. The Vestments were not in use when the last Act of Uniformity, the 13 & 14 Car. 2, c. 4, was passed. They could not, therefore, be "retained" under the 'Ornaments-Rubric' of that, or of the preceding Statute of *Elizabeth*. We contend, therefore, with great confidence, that, from the Acts of the Legislature we have referred to, the decisions of the Courts we have cited, and the various Advertisements, Visitations, and Injunctions, and the general use and practice in the Church from the time of Queen *Elizabeth* to the present day, the Vestments complained of have been considered prohibited, and declared illegal, and are and must be considered and so held now.

Next, with regard to the use of Wafer Bread, the Articles charge that the Respondent has offended against the Statute Law and the Constitutions and Canons Ecclesiastical by the use of Wafer Bread, instead of Bread such as is usual to be eaten, in the administration of the Holy Communion. The Rubric which we say the Respondent has violated is that made in 1662, which has been continued ever since, and is now in force. It is in these terms:

"And to take away all occasion of dissension, and superstition, which any person hath or might have concerning the Bread and Wine, it shall suffice that the Bread be such as is usual to be eaten; but the best and purest Wheat Bread that conveniently may be gotten." This, we contend, is mandatory, and not directory, not permissive, but coercive. The 20th Canon of 1603–4 directs the Churchwardens to provide a sufficient quantity of fine white Bread. Bishop *Mant*, in his Prayer Book, in reference to the Rubric first quoted, adopts Dr. *Nicholls'* view, and states the Rubric to be in opposition to the practice of the Greek and Roman Churches in late ages to use Wafers. The Wafer Bread which the Respondent adopts seems that prescribed in the Rubric which preceded that of 1552, and was in the first Prayer Book of *Edward* VI., A.D. 1549, which declared, that "For avoiding of all matters and occasion of dissension, it is meet that the Bread prepared for the Communion be made, through all this realm, after one sort and fashion; that is to say, unleavened, and round, as it was afore, but without all manner of print, and something more larger and thicker than it was, so that it may be aptly divided in divers pieces." This Rubric, however, was superseded by that in King *Edward's* second Prayer Book in 1552, which was adopted by the Committee appointed in 1558 to revise the Book of Common Prayer, and appended by them to the Book set forth in 1559, and was confirmed by the *Act of Uniformity*, 1 Eliz. c. 2; and this very Rubric is explained and further enforced by the Injunctions of Queen *Elizabeth* of 1559, which, regarding the Sacramental Bread, say: "Item.—Where, also, it was, in the time of King *Edward* VI. used to have the Sacramental Bread of common fine bread, it is ordered for the more reverence to be given to these holy mysteries, being the Sacraments of the body and blood of our Saviour Jesus Christ, that the said Sacramental Bread be made and formed plain, without any figure thereupon, of the same fineness and fashion, round, though somewhat bigger in compass and thickness, as the usual Bread and Wafer heretofore named 'singing Cakes,' which served for the use of the private Mass:" 1 *Cardwell's* Doc. Ann. p. 202. This Injunction, however, though it only went to the form of the Bread, was contrary to the Rubric of Queen *Elizabeth's* Prayer Book, and contrary, therefore,

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to *Elizabeth's Act of Uniformity*, and was one of the subjects of complaint made in the well-known Admonition to Parliament: Archbishop *Whitgift's* Works, vol. iii., p. 459; and was objected to by Archbishop *Parker*: Letters, Appendix, p. 90; and was ordered to be restored as provided by the Rubric of Queen *Elizabeth's* Prayer Book: *Robertson* on the Liturgy, p. 169; and finally settled by the 20th of the Canons of 1603–4, which directed the Parishes to provide "a sufficient quantity of fine white Bread and of good and wholesome Wine." To make the case of the Bread still plainer, the Rubric of 1662, which is the present Rubric, directs, for the reasons it there states, "that it shall suffice that the Bread be such as is usual to be eaten; but the best and purest Wheat Bread that conveniently may be gotten," the very words of the Rubric of the second Prayer Book of *Edward* VI. and of that of *Elizabeth* and *James* I. The object being to avoid any superstition regarding the Elements in the Sacrament: Archbishop *Whitgift's* Works, vol. iii., p. 84; *Nicholl's* Prayer Book, Supp. p. 28; *Mant's* Prayer Book, p. 378. The learned Judge of the Arches has held, that Wafer Bread may be used, provided it is made of the purest wheaten Flour; but no Rubric mentions Flour, and the best and purest wheaten Bread never can mean Wafer Bread, which never was in any general use, nor, since the days of Queen *Elizabeth*, "conveniently to be gotten." The Judge grounds his opinion on a Letter of Archbishop *Parker* to Sir *William Crewe* in 1570, to be found in the correspondence of the Archbishop, No. 283, p. 375, but which, even if an authority, does not justify such a conclusion, or the saving expression in the Rubric "that it shall suffice." While against the use of Wafer Bread is the history of its disuse, the Rubric, the Canon of 1603, and the interpretation put on it by the Bishops from 1662 to 1716: Rit. Com., 2 Rep., App. pp. 603, 606, 610, 638, 642, 650, 664, 679; and as regards the true meaning of the words "it shall suffice," they are not permissive, but must be construed as a positive direction, as used in the Baptismal Service for Infants, and in the directions for reading the Litany in the Ordination Service.

Article sixteen contains the charge for administering Wine mixed with Water instead of Wine, to the Communicants at the Lord's Supper. This the learned Dean of the Arches has held not to be a Canonical Offence, "provided that the mingling be not made at the

time of the celebration, so as to constitute a new rite or ceremony;" and he refers to his judgment in *Martin* v. *Mackonochie* (1), in which he stated the same opinion, such practice of adding a very small quantity of Water to the Wine having the warrant of primitive antiquity, citing *Thomas Aquinas, Summa Theologica,* part 3, *quæstio* 74, *De materiâ Eucharistiæ quantum ad speciem,* articles six, seven, and eight, and declared by him "to be clearly within that category of ceremonies as to the adoption of which each branch of the Church had its own liberty," referring also to the Rubric to the first Order of the Communion in the Prayer Book of 1549, which directs the mixing of Water with the Wine, though that Rubric is omitted in the Prayer Book of 1552 and all subsequent Books, Wine being alone mentioned; yet the learned Judge concludes that, though in the Rubric to the second Prayer Book the mention of Water is omitted, as there are no manual acts there prescribed, yet that in the present Prayer Book of 1662, where the manual acts are specified with great distinctness and particularity, the Compilers, having before them the first Prayer Book of *Edward* VI., must have intentionally omitted the mention of Water, as well as the act of mixing it, as prohibitory only of the ceremony or manual act of mixing during the celebration, and not any previous mixing, and that therefore the mixing, if not a part of the service, is not prohibited. In the judgment now under review the learned Dean of the Arches adheres to his former opinion, and fortifies it by reference to *Smith's* Dict. of the Bible, tit. 'Wine;' *Wheatley* on Common Prayer, p. 281; Bishop *Cosin,* who, speaking of the practice under the Elizabethan Prayer Books, says, "Our Church forbids it not, for aught I know, and they that think fit may use it, as some most eminent among us do at this day!" Notes on the Book of Common Prayer, 1st Series, vol. v., Works, p. 154. He states the practice of Bishop *Andrews* there instanced, and refers especially to the subject as treated by *Palmer* in his *Origines Liturgicæ,* vol. ii., p. 76, as confirmative of his view of the subject. Now, the conclusions on this head by the learned Judge are all derived from primitive use, and the absence in the present Rubric of any direct prohibition against the mixing of Water with the Wine; provided it be not mixed as a ceremonial part of the

(1) Law Rep. 2 A. & E. p. 216.

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administration of the Holy Communion. But except the notes in Bishop *Cosins*, and the inference drawn by *Palmer* in his *Origines Liturgicæ*, there is no authority sanctioning the practice, and it must be borne in mind that the notes in *Cosins* are not his, but were added after his death on the publication of his Works, and the authority of *Palmer* is but the opinion of a modern though able Writer. We, therefore, contend, regarding this matter of a Mixed Chalice, that the Rubrics are explicit and conclusive, nothing is to be found in them, throughout the Communion Service, which gives the least colour to the notion, that the Wine may be mixed with Water, either before, or at the time of the celebration of the Holy Communion, the Wine is spoken of as Wine; Water is not mentioned anywhere, and, except for the mention of it in the Prayer Books of 1549, and the historical record of its use in primitive times, there would be no pretence for introducing it. The 20th Canon directs the Churchwardens to "provide a sufficient quantity of fine white Bread and of good and wholesome Wine." The Churchwarden is nowhere directed to provide Water, as well as Wine, nor could he be compelled to do so; the direction to provide only Wine precludes the mixture of Water therewith, whether before or during the service. In a Visitation Charge delivered at *Truro* by the late Bishop of *Exeter*, Dr. *Phillpotts*, the Bishop alluded to the circumstance, that he had been informed, that some of the Clergy in his Diocese had adopted the practice of mixing Water with the Wine at the celebration of the Holy Communion, which he condemned as contrary to the institutions of the Church, which, since the Reformation, had disused the practice; and, reminding his Clergy of the solemn promise they had made at their ordination to obey the Orders of the Church, he enjoined those who had adopted the practice not to continue it. There could be no higher authority against the legality of such a practice than that of so learned and distinguished a prelate. Bishop *Mant* (*Horæ Liturgicæ*, p. 62) says: "The Church gives no countenance to the mixing of Water with the Sacramental Wine. The authority for so doing in King *Edward* VI.'s first Prayer Book, was subsequently, in 1552, withholden, and has not been revived; and," he adds, "to revive it now, were a dangerous, unwise, and offensive innovation."

Article Seventeen contains the charge against the Respondent,

for having, during the saying of the Prayer of Consecration, stood between the People and the Holy Table, with his back to the people, so that the people could not see him break the Bread or take the Cup into his hand. This is proved by the evidence in the Cause: but the learned Judge of the Arches Court does not consider this contrary to the Rubric before the Prayer of Consecration, which says: "When the Priest, standing before the Table, hath so ordered the Bread and Wine, that he may with the more readiness and decency break the Bread before the People, and take the Cup into his hands, he shall say the Prayer of Consecration." He considers the question as to the position of the Priest to have been settled by the decision of this Tribunal in the case of *Martin* v. *Mackonochie* (1); and though the evidence here proves that the Congregation could not see the Minister officiating break the Bread or take the Cup into his hands, as directed by the very words of the Rubric, the learned Judge is of opinion, that the Rubric does not, in fact, prescribe that the People should see the breaking of the Bread or the taking of the Cup into the Priest's hands; and upon the assumption, therefore, that the position of the Priest during the Prayer of Consecration has been already settled, he dismissed the charge against the Respondent. It is sufficient but to refer to the case relied on by the learned Judge to shew that he has mistaken its purport; the whole question at issue in that case was the posture of the Priest at the time of the Consecration Prayer; and the very sentence following that cited by the learned Judge, shews that their Lordships were dealing with the only question then before them, the posture and not the position of the Priest. The real difficulty, if there is any, arises from the now general, though comparatively modern, position of the Communion Table. The Rubric of 1662, which is the one now in force, following that of 1604, 1559, and 1552, directs that the Table at the Communion time, "having a fair white linen cloth upon it, shall stand in the Body of the Church, or in the Chancel, where Morning and Evening Prayer are appointed to be said. And the Priest standing at the north side of the Table," &c. Now, this Rubric must be taken in connection with the Rubric for the Order for Morning and Evening Prayer, which is the same now as in the second Prayer

(1) Law Rep. 2 P. C. 365, 382.

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Book of *Edward* VI., and directs that such Prayer shall be used in the accustomed place of the Church, Chapel, or Chancel, except it shall be otherwise determined by the Ordinary of the place:" and, therefore, gives absolute power to the Ordinary to appoint whether the Morning and Evening Prayer shall be said in the body of the Church or in the Chancel. It is plain that the Rubric contemplates the removal of the Holy Table at Communion time; and this agrees with the provisions of the 79th Canon and the Injunctions of *Elizabeth*; regarding Tables in Churches, 1 Card. Doc. Ann. p. 201, *Faulkner* v. *Litchfield* (1); the case of *Pilkington, Bishop of Durham*, 21 *Surtees* Soc. Pub. pp. 118 and 127; *Parker* Soc. Pub., *Pilkington*, Pref. p. iii.; Dr. *Cosin's* Case, 4 *Rush.* Coll. p. 208; 34 *Surtees* Soc. Pub. pp. 119, 216, all shew that the Communion Table was moveable.

But the question really is, not so much in what place the Table is to stand, as to what was the usual form of the Table, and in what position it was to stand in reference to its form. Now, if the Table is square, there is no difficulty; whether it was placed in the body of the Church or in the Chancel there would be a north side, at which, if the Priest stood, he could be seen by the People to break the Bread and take the Cup in his hand; and the same would strictly apply if the Table were oblong, provided it were placed lengthwise in the Chancel. But the difficulty which arises, and which the Respondent shelters himself under, is, that if the Table, being oblong, is placed lengthwise in the Chancel there is, as he contends, no north side, but at most only a north end, and, therefore, that the north side intended by the Rubric must be the north end of the west side, or that immediately in front of the Congregation, which compels the Priest to have his back to the People. The whole question has been recently treated and illustrated by the Rev. Mr. *Walton*, in a Pamphlet, published in 1870, entitled "The Rubrical Determination of the Celebrant's Position." He cites Bishop *Williams* on "The Holy Table, Name and Thing," who maintains, that as regards the intention of the Rubric, the side and the end of the Table are synonymous, and that side in the English tongue, in a Table placed lengthwise, is a long end (p. 57); so that the north end is practically the north side of the

(1) 1 Rob. Ecc. Rep. 251.

Table. It would be interesting, but it is not necessary, to investigate the history of the change of position of the Communion Table; it is ascribed to the Laudian party, between 1610 and 1640: *Le Bas*, Life of *Laud*, p. 28. And the records of many Cathedral and Collegiate Churches at and about those dates, shew the removal of the Communion Tables, and the placing them lengthwise, or, as it is sometimes termed, altarwise, a practice which has continued ever since. The total abolition of the term "Altar" as applied to the Communion Table, we have seen was effected by King *Edward* VI's second Prayer Book; but the form of the Table does not seem ever to have been defined, though it is quite clear, and upon that we insist, that be it a long or a square Table, the proper position of the Celebrant is, according to the Rubric, that side or end which faces the north, and that in no other position can he so manipulate the Elements as to be seen by the People, and thus comply with a most essential provision in the Rubric for the due celebration of the Holy Eucharist. The standing of the Priest with his back to the People, at the most solemn part of the ceremony of the administration of the Holy Communion, is not warranted in the Church of *England* by law or custom, and is, in fact, contrary alike to both.

There remains, then, the charge of the use of the consecrated, or, as it is called, the Holy Water, which is placed at the Doors of the Church for the use of the members of the Congregation; and the use of the Cap called the *Biretta*, which is used in processions by different Ministers in the Church. It is sufficient to observe, that there is no authority for the adoption or use of either of these, in the Rubrics or Formularies of our Church. The only Water that can be said to be consecrated in any service of the Church is that used in Baptism; and for the use of the *Biretta*, such an article is not to be found even in the lists of Vestments to which we have referred. Neither the 18th Canon or the 74th Canon of 1604, which are relied on by the learned Dean of the Arches, supports its use, the former applies exclusively to the laity; the latter, though applicable to the Ministers, says, "No Ecclesiastical person shall wear any Coif, or wrought night Cap, but only plain night Caps of black silk, satin, or velvet;" thus restricting the Cap to a close-fitting cap, such as is sometimes worn by

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aged Clergymen in our large Cathedrals, and is capable of being worn under the square Cap or academical trencher prescribed by the 74th Canon. The *Biretta* is, in fact, an article of the dress of the Roman Catholic Priest, and is used ceremonially in the service of the Mass: *Missale Romanum* [Ed. *Mechlin*, 1842]; *Dale's* Ceremonial according to Roman Rites [Ed. 1868]; and never has been used in our Church.

Lastly, we submit that the charges having been proved, the Court below ought to have allowed costs.

1871 *Feb.* 23.

The consideration of their Lordship's judgment was reserved. Judgment was now delivered by:

THE LORD CHANCELLOR:—

In this case, which comes to us from the Arches Court of *Canterbury*, the learned Judge of that Court has directed a Monition to issue to the Rev. *John Purchas*, as to several matters and things complained of by the Promoter, and has condemned him in costs; and the Defendant has not appealed. But as to certain charges contained in the sixteenth, seventeenth, twentieth, twenty-fifth, thirty-sixth, and thirty-eighth Articles of charge, the learned Judge has refused, or omitted, to direct a Monition to issue against the Defendant, and to condemn him in the costs of these Articles: and against the decision upon these Articles the Promoter has appealed.

The substitution of *Hebbert* as Promoter, for the purpose of this Appeal, for *Elphinstone*, the Promoter in the Court below, since deceased, has been allowed by a former judgment of this Committee (1).

The Rev. *John Purchas*, the Respondent, has not appeared, and the Committee has not had the assistance of the argument of Counsel on his behalf.

The charges which are the subject of this Appeal, are that the Respondent has offended against the Statute Law and the Constitutions and Canons Ecclesiastical, by administering Wine mixed with Water, instead of Wine, to the communicants, as pleaded in the 16th Article; and by standing with his back to the People, between the People and the Holy Table, whilst reading the Prayer

(1) *Ante*, p. 245.

of Consecration in the Holy Communion, as pleaded in the 17th Article; and by the use of Wafer Bread instead of Bread such as is usual to be eaten, in the administration of the Holy Communion, as pleaded in the 20th Article; and by causing Holy Water, or Water previously blessed or consecrated, to be poured into divers receptacles for the same in the said Church, in order that the same might be used by persons in the congregation, or by causing or permitting the same to be used by others, as pleaded in the 25th Article; and by himself wearing, and sanctioning, and authorizing the wearing by other officiating Ministers, whilst officiating in the Communion Service, and in the administration of the Holy Communion in the said Church, a Vestment called a *Chasuble*, as pleaded in the 36th Article; and by himself wearing, and causing or suffering to be worn by other officiating Clergy, when officiating in the Communion Service in the said Church, certain other Vestments called *Dalmatics*, *Tunics*, or *Tunicles*, and *Albs*, and by himself wearing, carrying, or causing or suffering other officiating Clergy in the same Church to wear or bear in their hand, a certain Cap called a *Biretta*, during Divine Service, as pleaded in the 38th Article.

We find it convenient to adopt the order followed by the learned Dean of the Arches, and to examine first, the charge of wearing and causing to be worn, a *Chasuble*, *Tunics*, or *Tunicles*, and *Albs*, in the celebration of the Holy Communion.

It is necessary to review shortly the history of the Rubric, usually known as the "Ornaments-Rubric," which governs this question.

The first Prayer Book of King *Edward* VI., 1549, contains the following Rubric at the beginning of the Communion office:—

"Upon the day, and at the time appointed for the ministration of the Holy Communion, the Priest that shall execute the Holy ministry, shall put upon him the vesture appointed for that ministration, that is to say: a white Albe plain, with a Vestment or Cope. And where there may be many Priests or Deacons, there so many shall be ready to help the Priest, in the ministration, as shall be requisite; and shall have upon them likewise the vestures appointed for their ministry, that is to say, Albes with Tunicles."

In the second Prayer Book of *Edward* VI. (A.D. 1552) this was

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altered, and it was ordered that the Minister "shall use neither Alb, Vestment, nor Cope: but being Archbishop, or Bishop, he shall have and wear a Rochet, and being a Priest or Deacon he shall have and wear a Surplice only."

The Prayer Book of *Elizabeth* (A.D. 1559) provided that "the Minister at the time of the Communion, and at all other times of his ministration, shall use such Ornaments in the Church as were in use by authority of Parliament in the second year of the reign of King *Edward* VI. according to the Act of Parliament set in the beginning of this Book."

This Committee has already decided in *Westerton* v. *Liddell*, that the words " by authority of Parliament in the second year of the reign of King *Edward* VI.," refer to the first Prayer Book of King *Edward* VI.

The Act of Parliament set in the beginning of *Elizabeth's* Book is Queen *Elizabeth's Act of Uniformity* (1 Eliz. c. 2), and the 25th clause of that Act, contains a proviso, " That such Ornaments of the Church, and of the Ministers thereof, shall be retained and be in Use, as was in this Church of *England*, by authority of Parliament, in the second year of the reign of King *Edward* the Sixth, until other Order shall be therein taken by the authority of the Queen's Majesty, with the advice of the Commissioners appointed and authorized under the Great Seal of *England* for causes Ecclesiastical, or of the Metropolitan of this Realm."

The Prayer Book, therefore, refers to the Act, and the Act clearly contemplated further directions to be given by the Queen, with the advice of Commissioners or of the Metropolitan. It was not, apparently, thought desirable to effect an immediate outward change of ceremonies, although the adoption of the second Prayer Book of *Edward* VI., in lieu of the first, had effected a great change in the very substance of the Communion Service, with which the theory of the peculiar Vestments (the *Alb* and *Chasuble*) was closely connected.

The Rubric and the proviso together seem to restore for the present, the Ornaments of the Minister which the second Prayer Book of King *Edward* had taken away. But *Sandys*, afterwards Archbishop of *York*, who assisted at the revision of the Prayer Book, gives to Archbishop *Parker* a different suggestion :—" Our

gloss upon this text," he says, "is, that we shall not be forced to use them (the Ornaments), but that others in the meantime shall not convey them away, but that they shall remain for the Queen" (*Burnet's* Reformation, vol. ii., Records, p. 332). The Injunctions of *Elizabeth* appeared in the same year, 1559; and the 47th orders "That the Churchwardens of every Parish shall deliver unto the Visitors the inventories of Vestments, Copes, and other Ornaments, plate, Books, and specially of grails, couchers, legends, processionals, hymnals, manuals, portasses, and such like appertaining to the Church" (*Cardwell*, Doc. Ann. I., p. 196 [Ed. 1839]). The Commissioners began to carry out these Injunctions in the same year. One of their returns is in the Record Office (Calendar of State Papers, Domestic, 1547–1580, p. 148), which shews that they chiefly occupied themselves in taking inventories of Church Ornaments, and of the service Books in use.

In the year 1564 appeared the Advertisements of *Elizabeth*. They make order for the vesture of the Minister in these words: "In the ministration of the Holy Communion in Cathedral and Collegiate Churches, the principal Minister shall wear a *Cope*, with Gospeler and Epistoler agreeably, and at all other prayers to be said at the Communion Table to use no *Copes* but *Surplices*."

"That every Minister saying any public prayers, or ministering the Sacraments or other rites of the Church, shall wear a comely *Surplice* with sleeves, to be provided at the charge of the parish" (*Cardwell*, Doc. Ann., I., 326).

These Advertisements were very actively enforced within a few years of their publication. An inventory of the Ornaments of 150 parishes in the Diocese of *Lincoln*, A.D. 1565–1566, has been published by Mr. *Edward Peacock;* and it shews that the *Chasubles* or Vestments, and the *Albs*, were systematically defaced, destroyed, or put to other uses, and a precise account was rendered of the mode of their destruction. Proceedings took place under Commissions in *Lancashire* in 1565 and 1570; in *Carlisle* in 1573, and following years, when "Vestments seem to have disappeared altogether" (Rev. *J. Raine*, on "Vestments," *London*, 1866). There is no reason to doubt, that all through the Country commissions were issued to enforce the observance of the Advertisements, within a few years after they were drawn up.

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The Visitation Articles of the Archbishops and Bishops about this time, shew that the operation of the Advertisements had been rapid and complete. Archbishop *Grindal*, in 1571, inquires, "whether all Vestments, Albs, Tunicles, stoles, phanons, pixes, paxes, hand-bells, sacring-bells, censers, crismatories, crosses, candlesticks, holy water stocks, images, and such other reliques and monuments of superstition and idolatrie be utterly defaced, broken, and destroyed." (Rit. Com. 2nd Rep. Appx. p. 408) Archbishop *Parker*, in 1575, asks, "in the time of celebration of Divine service whether they wear Surplices." (Rit. Com. 2nd Rep. Appx. p. 416) *Aylmer*, Bishop of *London*, uses the same form of question as Archbishop *Grindal* (Ibid. p. 418 *b.*); *Sandys*, Archbishop of *York*, inquired, in 1578, "whether your Parson, Vicar, or Curate, at all times in saying the Common Prayer upon Sundays and holydays, and in administering of the Sacrament, doth use and retain the Surplice, yea or nay." (Ibid. p. 422 *a.*)

Upon the whole, there is abundant evidence, that within a few years after the Advertisements were issued, the Vestments used in the Mass entirely disappeared,

It is true, that for some years after the appearance of the Advertisements, great reluctance was exhibited by the Puritan party to the use of the *Surplice*, and in the struggle against the use, they sometimes asserted that, if the *Surplice* were insisted upon, then, by virtue of the Rubric and Act of Parliament, the other Vestments mentioned in the first Prayer Book of *Edward* VI. should also be used.

In a somewhat rare Tract, printed in the reign of *James* I, 1605, and addressed to the Bishop of *Worcester*, defending "the not exact use of the authorized Book of Common Prayer," the Writer (p. 34) argues, that no such order was made by the Queen as was directed by the Act of Parliament, yet even he admits that the Metropolitan, "on the Queen's mandative Letters that some order might be taken, had conference and communication, and at the last, by assent and consent of the Ecclesiastical Commissioners, did think such orders as were specified in the Advertisements meet and convenient to be used and followed" (p. 36); but he asserts that they were of no value, since "the Queen's assent was not yielded."

This last proposition can hardly be maintained; for if the

Queen's mandative letter preceded the compilation of the Advertisements, and if, as it appears abundantly, they were afterwards enforced as by her authority, her assent must be presumed. It appears probable that the Queen hesitated before the Advertisements were thus enforced; as to which see a remarkable Letter from the Archbishop to *Cecil*, on the 28th of March, 1566, cited by Mr. *Perry* in his Book on "Lawful Church Ornaments," (p. 209), from the *Parker* Correspondence, on which Mr. *Perry* remarks "It would seem that the Archbishop's application had at length some success, for immediately afterwards he sent his letter to the Bishop of *London* for conformity," and in the letter to the Bishop he requests him "to transmit the Book of Advertisements to the other Suffragans of the Province."

But, as has been said, the contemporaneous evidence as to the abolition of all vestments obnoxious to the Puritan party (other than the Surplice, hood, and tippet, and the square cap) is abundant.

In a scarce Book, called "A Part of a Register," in which is a considerable number of documents collected by those who objected to Church Ritual, the complaint is uniformly against Copes and Surplices. Thus, in a Letter by A. G., 1570, page 13, he complains of "crossing, coping, and surplessing." A Report of the Examination of *Smith*, *Nixon*, and others before the Lord Mayor, the Bishop of *London*, and other Commissioners, 1567, page 28, describes *Hawkins*, one of the accused, as saying, "Surplesses and Copes be superstitious and idolatrous." *Ireland*, another of them (p. 32) says to the Bishop, "But you go like one of the Mass Priests still;" to which the Bishop replies—"You see me wear a Cope or a Surpless at Paul's. I had rather Minister without these things, but for order's sake and for obedience to the Prince."

In another of these documents, called "A View of Antichrist His Laws and Ceremonies," there is a careful enumeration of ornaments complained of as Popish, not mentioning Alb nor Chasuble; but (page 63) there is mention of "the Cap, the Tippet, the Surplice for small Churches, the Cope for great Churches, furred Hoods in summer for the great Doctors, silken hoods in their quiers upon a Surplesse, and the grey amise with the catte's tails." This mention of the amice is the only notice in the many tracts collected in the Register of any specific Vestment other than the

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Surplice and Cope being worn. But in the same book is contained "A Letter by Master *Robert Johnson* to Master *Edwin Sandys* (1573)," in which, at page 104, he says, "You must yield some reason why the Tippet is commended and the Stole forbidden; why the Vestment is put away and the Cope retained; why the Alb is laid aside and the Surplice is used; or why the Chalice is forbidden in the Bishop of *Canterbury's* Articles or the grey amice by the Canon more than the rest, why have they offended, &c." *Edward Dering* (1593), in another Tract in the same Book, speaks of the grey amice having been specially forbidden in the "Book of the Discipline of the Church of *England*." He goes on to say that other Vestments, equally superstitious, are used; and in a passage immediately before this he asks, "how he can subscribe to the ceremonies in Cathedral Churches, where they have the Priest, Dean, and Sub-dean in Copes and Vestments, all as before;" but that he is alluding in this to the Cope and Surplice is plain both from the before-cited statement of the Bishop of *London* to *Hawkins*, and from the question in *Johnson's* tract, "Why the Vestment is put away and the Cope retained, the Alb laid aside and the Surplice in use;" and the enumeration of Popish Ornaments in "The View of Antichrist."

Now all the Tracts above cited are dated within ten years after the date of the Advertisements, and the complaints so bitterly made as to the Cope, and Surplice, would certainly have been extended to the *Alb*, and *Chasuble*, had they not then ceased to exist.

In the correspondence with Foreign Reformers, called the "*Zurich* Letters," the controversy is treated as having become confined to the Cope and Surplice.

At the *Hampton Court* Conference the Puritans objected to the Surplice, as "a kind of Garment which the Priests of *Isis* used to wear." (*Cardwell*, Conferences, p. 200). There was evidently no other Vestment in use to which they could object. The revised Prayer Book, issued soon after, retained the Ornaments-Rubric in the same form as in the Prayer Book of Queen *Elizabeth*. The Canons of 1603–4, enacted by both Convocations, and ratified by the King's consent, sanctioned the use of this Prayer Book. But whilst thus implicitly sanctioning the Ornaments-Rubric, the

Canons also provide specially for the vesture of the Minister. Canon 24 directs the use of "a decent Cope" for the principal Minister in the Holy Communion in Cathedrals and Collegiate Churches "according to the Advertisements published Anno 7 *Elizabeth*;" and Canon 58 directs that "every Minister saying the public prayers or ministering the Sacraments or other rites of the Church shall use a decent and comely Surplice with sleeves, to be provided at the charge of the Parish."

Their Lordships think it needless to adduce authorities to shew that there was no attempt to revive or use the *Chasuble, Alb,* and *Tunicle,* between the years 1604 and 1662.

The Ornaments-Rubric of 1662 is as follows:—"*And here it is to be noted, that such Ornaments of the Church, and of the Ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the Authority of Parliament, in the Second Year of the Reign of King Edward* VI." The form of this Rubric is different from that of the preceding Prayer Book, and follows, for the most part, the wording of the proviso of the Act of Queen *Elizabeth.*

The learned Judge in the Court below assumes, that the Puritan party at the *Savoy* Conference objected to this Rubric: whereas it was the Rubric of *James* that they were discussing. Upon that, the Puritans observed that, "Inasmuch as this Rubric seemeth to bring back the Cope, Alb, and other Vestments forbidden by the Common Prayer Book, 5 & 6 *Edward* VI., and so for reasons alleged against ceremonies under our eighteenth general exception, we deem it may be wholly left out." The Rubric had been in force for nearly sixty years, and they do not allege that the Vestments had been brought back; nor would a total omission of the Rubric have been a protection against them. The Bishops in their answer shew that they understand the Surplice to be in question, and not the Vestments (*Cardwell,* Conferences, 314, 345, 351). But the learned Judge, through this oversight, has overlooked the most important part of the proceedings. The Bishops determined that the Rubric "should continue as it is." But after this they did, in fact, re-cast it entirely. It must not be assumed that alterations made under such circumstances were made without thought, and are of no importance. The Rubric had directed the

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Minister to "use at the time of the Communion, and at all other times of his ministrations," the ornaments in question. The Statute of *Elizabeth* did not direct such use, nor refer to any special times of ministration, but it ordered simply the retaining of the ornaments till further order made by the Queen. The Bishops threw aside the form of the old Rubric and adopted that of the Statute of *Elizabeth*, but added the words "at all times of their ministration" without the words which had in all former Rubrics distinguished the Holy Communion from other ministrations; a mode of expression more suitable to a state of things wherein the Vestments for all ministrations had become the same. The change also brought in the word "retained," which, it has been argued, would not include things already obsolete. Whatever be the force of these two arguments, the fact is clear that the Puritans objected to a Rubric differing from this; and that after their objections the Rubric was re-cast, and brought into its present form.

With regard to the suggestion attributed to the House of Lords, "whether the Rubric should not be mended where all Vestments in time of Divine service are now commanded which were used by *Edward* VI." (*Cardwell*, Conferences, p. 274), the learned Judge has overlooked the fact that this applies to the earlier Rubric; and the suggestion did not emanate from the House of Lords, nor was it ever adopted by that body. And the learned Judge omits to observe, that the Rubric of *James*, which was objected to, was amended after the suggestion.

From the passing of the *Act of Uniformity* there is abundant evidence to shew that the Vestments in question were not used at all. Their Lordships may refer to the various Visitation Articles published in the Second Report of the Ritual Commission and elsewhere, as shewing that the *Surplice* alone was to be used, and that deviations from that rule were on the side of defect, and not in the direction of returning to the Vestments of the Mass. Some of these Articles were published by *Bishop Cosin* and others who took part in the revision of the Prayer Book. In the 6th Article *Bishop Cosin* inquires "have you a large and decent Surplice (one or more) for the Minister to wear at all times of his publick ministration in the Church?" (Rit. Com. 2nd Rep., Appx. p. 601 *b*.) This repetition of the words at all times of his ministration, the exact

words of the Rubric, is very significant as a contemporaneous exposition of it by one of its framers.

These, then, are the leading historical facts with which we have to deal in the difficult task of construing the Rubric of Ornaments. The *Vestment*, or *Cope*, *Alb*, and *Tunicle* were ordered by the First Prayer Book of *Edward* VI. They were abolished by the Prayer Book of 1552, and the Surplice was substituted. They were provisionally restored by the Statute of *Elizabeth*, and by her Prayer Book of 1559. But the Injunctions and the Advertisements of *Elizabeth* established a new order within a few years from the passing of the Statute, under which *Chasuble*, *Alb*, and *Tunicle* disappeared. The Canons of 1603–4, adopting anew the reference to the Rubric of *Edward* VI., sanctioned in express terms all that the Advertisements had done in the matter of the Vestments, and ordered the *Surplice* only to be used in Parish Churches. The revisers of our present Prayer Book in 1662, under another form of words, repeated the reference to the second year of *Edward* VI., and they did so advisedly, after attention had been called to the possibility of a return to the Vestments.

The authority of the Advertisements has been questioned, on the ground, that it has never been shewn that they received the assent of the Queen. Supposing, for the sake of argument, that the Advertisements did not receive the official assent of the Queen, but were acted upon under a number of Royal Commissions, and with the approval of the Metropolitan, their Lordships think this was a "taking other order" within the meaning of the Statute; 1 Eliz. c. 2, s. 25. There is no doubt that the Advertisements were carried into effect as legally binding, and were enforced by Royal Commissions. There is no doubt that they were accepted, in some cases by reluctant people, as of legal obligation; and their authority is expressly recognised by the 24th Canon of 1603–4.

In the case of *Macdougall* v. *Purrier* (1), the House of Lords presumed the enrolment in Chancery of a Decree of Commissioners appointed by an Act of *Henry* VIII., for settling the Tithes in *London*, although no such enrolment could be found, on the principle that where instruments have been long acted on, and acquiesced in by parties interested in opposing their effect, all formalities

(1) 4 Bli. H. L. Cases (N.C.), 433.

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shall be presumed to have been observed. No special form of consulting the Metropolitan is prescribed to the Queen.

Their Lordships are now called on to determine the force of the Rubric of 1662, and its effect upon other regulations, such as the Canons of 1603-4. They do not disguise from themselves that the task is difficult.

The learned Judge in the Court below, has said that "the plain words of the Statute, according to the ordinary principles of interpretation, and the construction which they have received in two judgments of the Privy Council, oblige me to pronounce, that the Ornaments of the Minister, mentioned in the first Prayer Book of *Edward* VI., are those to which the present Rubric referred" (1). "They are, for Ministers below the order of Bishops, and when officiating at the Communion Service, *Cope*, *Vestment*, or *Chasuble*, *Surplice*, *Alb*, and *Tunicle;* in all other services the Surplice only, except that in Cathedral Churches and Colleges the academical hood may be also worn." He considers that the object of the Advertisements of *Elizabeth* "was to secure as great an amount of decent Ritual as the circumstances of the time would permit."

"As to the Visitation Articles," from the time of the Statute of *Charles* II., the learned Judge observes, "the same principle applies to them as to the Advertisements and Canons, and indeed as to every attempt to procure a decent Ritual since Queen *Elizabeth's* time; namely, that the authorities were content to order the minimum of what was requisite for this purpose" (2). Remarking upon the question, whether the consent of the King to the Canons of 1603-4 could be held to be an execution of the powers given to the Queen by the Statute of *Elizabeth*, the learned Judge, after some comments which their Lordships do not feel called on to examine, says "a subsequent Statute, which expressly revived a prior Statute inconsistent with the Advertisements of *Elizabeth*, would, by necessary implication, repeal them" (3).

The Committee is unable to accept this interpretation of the Advertisements and the Visitation Articles as the true one. Their Lordships think that the defacing and destroying, and converting to profane and other uses, of all the Vestments now in question, as described in the *Lincoln* MS. published by Mr. *Peacock*, shew a

(1) Law Rep. 3 A. & E. 94. (2) Ibid. 90. (3) Ibid. 87.

determination to remove utterly these ornaments, and not to leave them to be used hereafter when higher Ritual might become possible. They think that the inquiries of *Sandys* and *Aylmer*, already quoted, shew that the *Surplice* was not to be the least or lowest, but the only Vestment of the parochial Clergy. They think that the Articles of Visitation (cited Rit. Com. 2nd Rep., Appx.), issued at and after the passing of the *Act of Uniformity*, which ask after the "fair Surplice for the Minister to wear at all times of his ministration," without any suggestion of any other Vestment, could scarcely have been put forth by Bishops desirous of a more elaborate Ritual, and aware that the Vestments were now of statutable obligation. They think that in prescribing the Surplice only, the Advertisements meant what they said, the Surplice only; and that strong steps were taken to insure that only the Surplice should be used.

Their Lordships remark further, that the doctrine of a minimum of ritual represented by the Surplice, with a maximum represented by a return to the mediæval Vestments, is inconsistent with the fact that the Rubric is a positive order, under a penal Statute, accepted by each Clergyman in a remarkably strong expression of "assent and consent" and capable of being enforced with severe penalties. It is not to be assumed, without proof, that such a Statute was framed so as to leave a choice between contrary interpretations, in a question that had ever been regarded as momentous, and had stirred, as the learned Judge remarks, some of the strongest passions of man. Historically all the communications between Archbishop *Parker* and the Queen and her Government, indicate a strong desire for uniformity, and the Articles of Visitation after 1662 were all framed with the like object. If the Minister is ordered to wear a *Surplice* at all times of his ministration, he cannot wear an *Alb* and *Tunicle* when assisting at the Holy Communion; if he is to celebrate the Holy Communion in a *Chasuble*, he cannot celebrate in a *Surplice*.

In order to decide the question before the Committee, it seems desirable first to examine the effect of the Church legislation of 1603–4. The 14th Canon orders the use of the Prayer Book without omission or innovation, and the 80th Canon directs that copies of the Prayer Book are to be provided, in its latest revised

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form, and, by implication, the Ornaments-Rubric is thus made binding on the Clergy. Canon 24th directs the use of the Cope in Cathedral and Collegiate Churches upon principal Feast days, "according to the Advertisements for this end, *anno* 7 *Elizabeth*." Canon 58th says that "every Minister saying the public prayers, or ministering the Sacraments or other rites of the Church, shall wear a decent and comely Surplice with sleeves, to be provided at the charge of the Parish." There can be no doubt that the intention here was not to set up a contradictory rule, by prescribing Vestments in the Prayer Book, and a *Surplice* in the Canons, which give authority to the Prayer Book. It could not be intended, in recognising the legal force of the Advertisements, to bring back the things which the Advertisements had taken away, nor could it be expected that either the Minister or People should provide Vestments in lieu of those which had been destroyed, and accordingly no direction is given with regard to them. The provisions of the Canons and Prayer Book must be read together, as far as possible, and the Canons upon the vesture of the Ministers must be held to be an exposition and limitation of the Rubric of Ornaments. Such Ornaments are to be used as were in use in the second year of *Edward* VI., limited as to the Vestments, by the special provisions of the Canons themselves; and the contemporaneous exposition of universal practice, shew that this was regarded as the meaning of the Canons. There does not appear to have been any return to the Vestments in any quarter whatever.

The Act of 1662 sanctioned a Prayer Book with a different Rubric, but it referred back to the second of *Edward* VI., and in some sense or other revived the Rubric of King *Edward's* First Book; the question is, in what sense and in what degree. There seem to be three opinions on this point.

One, that the Act of 1662 repealed all legislation on the subject of the Ornaments of the Minister; the second, that the Act and the Canons set up two distinct standards of ritual on this subject; and the third, that the Act of 1662 is to be read with the Canons of 1602 still in force, and harmonized with them.

I. The first is that expressed by Dr. *Lushington*, Judge of the Consistory Court, in the case of *Westerton* v. *Liddell* (1), that in

(1) Moore's Special Report, p. 32.

reviving the Rubric of 1549 the Act of 1662 excluded and repealed all provisions whatever of Act of Parliament or Canon which had been made after 1549 and prior to 1662. This view was adopted by Sir *John Dodson*, Dean of the Arches Court in the same case, when it reached the Arches Court. The consequence of this must be, that every celebration of the Holy Communion in a *Surplice* only, from 1662 to the present day, would be a violation of the Statute. The Canons of 1603-4 being repealed as to this matter, together with the Advertisements on which the Canons were built, there would be no legal warrant for using the *Surplice* and omitting to use the *Vestments* at the Holy Communion. Yet there is no doubt of the practice. For one hundred and eighty years the *Vestment* was never worn. And thus there would be the unusual occurrence of a Statute repealing former legislation, and fortified with heavy penalties, which was systematically broken, not only by one and all of those who had declared their unfeigned assent and consent to all and everything contained in the Book of Common Prayer, but by the framers of the Rubric themselves immediately after the confirmation of it by Act of Parliament. Nor is there during that time one single instance of calling to account or censuring any one for his particular share in a universal violation of the law. It appears plain to their Lordships from these facts that the idea of the repealing power of this Rubric is a modern one.

But the 24th clause of the *Act of Uniformity* (13 & 14 Car. 2, c. 4) shews, that it was not the intention of the passers of the Act to repeal past laws. It provides that "the several good Laws and Statutes of this realm which have been formerly made, and are now in force, for the uniformity of Prayer and the administration of the Sacraments . . . shall stand in full force and strength, to all intents and purposes whatever, for the establishing and confirming the said Book." The laws were to remain; but they were to bear on the new Book of Common Prayer, and not upon any former one. Now, the Prayer Book up to that time in use—the Book which was the subject of the *Hampton Court* Conference—rested upon the Canons of 1603-4; and it is hard to suppose that the most obvious "laws" of all, those in force up to that moment, were excluded from the saving power of this 24th clause. Their Lordships think that the Canons relating to the *Vestments* of the Ministers were not repealed by the

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Act of Uniformity, and that the Canons had the same force after the passing of that Act which they had before. The contemporary exposition on this point is very strong. Bishop *Henchman*, of *Salisbury*, in 1662, in inquiring whether his Churches are provided with the Prayer Book "newly established," inquires for the "comely, large, and fine Surplice," and for no other Vestment. The same inquiry for the "comely large Surplice, for the Minister to wear at all times of his ministration," is found in a great number of Visitation Articles, republished by the Ritual Commission (2nd Rep., Appendix, pp. 606, 614, and following), extending from 1662 to the end of the century. Bishop *Fuller*, of *Lincoln*, A.D. 1671, Bishop *Gunning*, of *Ely*, A.D. 1679, and Bishop *Trimnell*, of *Norwich*, A.D. 1716, refer to the 58th Canon as unrepealed, in the margin of their Visitation Articles upon the *Surplice*. Their Lordships are of opinion, that the Canon was not repealed, and that the Ecclesiastical authorities had no suspicion that it had been.

II. The next opinion is, that the Canons and the *Act of Uniformity*, being irreconcilable, set up distinct standards of Ritual, the one of a more elaborate and the other of a severer type, the one a *maximum* and the other a *minimum*, the one represented by the Rubric and the other by the 58th Canon. To this view the learned Judge in the Court below appears to incline. Their Lordships, notwithstanding this authority, are obliged to come to the conclusion that this view is at variance with all the facts of the case. They have already observed that the *Chasuble*, *Alb*, and *Tunicle*, were swept away with severe exactness in the time of Queen *Elizabeth*, and that there was no trace of any attempt to revive them. The *Act of Uniformity* reflects, by the strictness of its provisions, the temper of the framers. The fate of a "proviso as to the dispensation with deprivation, for not using the cross and surplice," which was sent down from the House of Lords to the House of Commons, illustrates this. The Commons rejected the proviso (Commons' Journals, VIII., 413), and in the subsequent conference between the two Houses, the Manager, Serjeant *Charlton*, gave, amongst other reasons for rejecting the proviso, "that it would unavoidably establish schism . . . that he thought it better to impose no ceremonies than to dispense with any; and he thought it very incongruous at the same time when you are settling

uniformity to establish schism" (Lords' Journals, vol. xi., p. 449 *a*). And the House of Lords agreed that this proviso should be struck out (Lords' Journals, vol. xi., pp. 450 *a*, 450 *b*). It cannot be supposed that an Act which applied the principle of uniformity so strictly in one direction, was intended on the other, to open the door to a return to practices that were suspected as Romish, and this without serious remonstrance in either House from the minority. The purpose of the Act is clear. It was to establish a uniformity upon all parties alike. That is its language, and that is the interpretation it bore with those in authority, who had to expound it in Visitation Articles and the like.

III. The third opinion remains, that the provisions of the Rubric of *Edward* VI. are continued, so far as they are not contrariant to other provisions still in force. And here it is to be observed again that the Rubric was altered, after refusal to listen to the Puritan objections, to a form different from that of any former Rubric, by introducing the word "retained." Both in the Statute of *Elizabeth* and in the Rubric in question the word "retain" seems to mean that things should remain as they were at the time of the enactment. *Chasuble*, *Alb*, and *Tunicle* had disappeared for more than sixty years; and it has been argued fairly that this word would not have force to bring back anything that had disappeared more than a generation ago. To retain means, in common parlance, to continue something now in existence. It is reasonable to presume that the alteration was not made without some purpose; and it appears to their Lordships, that the words of the Rubric strictly construed, would not suffice to revive Ornaments which had been lawfully set aside, although they were in use in the second year of *Edward* VI. But whether this be so or not, their Lordships are of opinion, that as the Canons of 1603–4, which in one part seemed to revive the Vestments, and in another to order the *Surplice* for all ministrations, ought to be construed together, so the *Act of Uniformity* is to be construed with the two Canons on this subject, which it did not repeal, and that the result is that the *Cope* is to be worn in ministering the Holy Communion on high feast days in Catherals and Collegiate Churches, and the *Surplice* in all other ministrations. Their Lordships attach great weight to the abundant evidence which now exists that from the days of *Elizabeth* to

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about 1840, the practice is uniformly in accordance with this view; and is irreconcilable with either of the other views. Through the researches that have been referred to in these remarks a clear and abundant *expositio contemporanea* has been supplied, which compensates for the scantiness of some other materials for a judgment.

It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a Statute, but contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents. In the case of *The Attorney-General* v. *The Mayor of Bristol* (1) Lord *Eldon* observes: "Length of time (though it must be admitted that the Charity is not barred by it), is a very material consideration, when the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust?" We may ask in like manner what is the true construction of the Act of 1662 and of the Rubric which it sanctioned? Is it according to the practice of two centuries, or was the practice a continual breach of the law, commanded and enforced by the Bishops, including the very Bishops who aided in framing the Act?

The learned Judge relies on two former judgments of this Committee as having almost determined the question of vestments; one of them in the case of *Westerton* v. *Liddell*, and the other in the case of *Martin* v. *Mackonochie*.

In *Westerton* v. *Liddell*, the question which their Lordships had to decide was, whether the Rubric which excluded all use of crosses in the service, affected crosses not used in the service, but employed for decoration of the building only, and they determined that these were unaffected by the Rubric.

They decided, that the Rubric in question referred to the Act passed in 2 & 3 Edw. 6, adopting the First Prayer Book, and not to any Canons or Injunctions having the authority of Parliament, but adopted at an earlier period. Their Lordships feel quite free to adopt both the positive and the negative conclusions thus arrived at. In construing the expressions made use of in that

(1) 2 Jac. & W. 321.

judgment, it should be borne in mind that this question of the *Vestments* was not before the Court.

In *Martin* v. *Mackonochie* the Committee stated anew the substance of the judgment in *Westerton* v. *Liddell* upon this point, but did not propose to take up any new ground.

Their Lordships will advise Her Majesty that the Respondent has offended against the Laws Ecclesiastical in wearing the *Chasuble, Alb,* and *Tunicle;* and that a Monition shall issue against the Respondent accordingly.

With respect to the Cap called a *Biretta*, which the Respondent is said to have carried in his hand, but not to have worn in Church, their Lordships would not be justified, upon the evidence before them, in pronouncing that the Respondent did an unlawful act.

As to the Holy or consecrated Water in the Church, the evidence does not go to the full extent of the charge. There is no proof whatever, that the Water placed in the Church was consecrated at all, nor that it was put there by the Respondent, with the purpose of its being used as the Congregation seem to have used it. This is a penal proceeding, and each charge must be strictly proved as alleged. Upon this point, too, the appeal must be disallowed.

Their Lordships now proceed to the 16th Article, which charges that, on a certain day, the Respondent "administered Wine mixed with Water instead of Wine to the Communicants at the Lord's Supper." The learned Judge in the Court below has decided that it is illegal to mix Water with the wine at the time of the service of Holy Communion; but he decides that Water may be mixed with the Wine "provided that the mingling be not made at the time of the celebration"(1). For this view the learned Judge quotes, amongst other authorities, Bishop *Andrews*, but it has escaped him that the practice of Bishop *Andrews* was that which he condemns; in his Consecration Service, the Bishop directs as follows:—*Episcopus de novo in Calicem ex poculo quod in sacrâ mensâ stabat, effundit admistâque aquâ, recitat clare verba illa consecratoria.* (*Sparrow's* Articles p. 396, &c.) The learned Judge considers that the act of mixing has some symbolical meaning, but he holds—referring to his judgment in *Martin* v. *Mackonochie* (2)—that it was "wholly unconnected with any papal superstition, or any doctrine which the Church of

(1) Law Rep. 3 A. & E. 102. (2) Law Rep. 2 A. & E. 216.

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England has rejected." Nor does it appear that the controversy between the Romish and Reformed Churches, turned so much upon the symbolism of the mixed Cup, as upon the necessity of its use.

Their Lordships find here two questions for their consideration. Since it has been decided by this Committee, that additional ceremonies or innovations are excluded by implication, by the service for Holy Communion; or, in other words, that the service for Holy Communion is not only a guide but a sufficient guide in its celebration; and since the learned Judge has decided that the act of mingling wine with water in the Service, with a view to its administration, is one of the additional ceremonies so excluded, the first question is whether the doing the act before the service, and in the vestry or elsewhere, could so alter the symbolical character of the act, that the Cup might be brought in and consecrated and administered to the People, without constituting an innovation or additional ceremonial act, beyond what is ordered in the service.

If this question be decided in the affirmative, the second question would be, whether upon a fair construction of the directions of the Rubrics, this previous mingling could take place without violations of the Rubrics.

The first question is, whether this is an additional ceremony, not provided in the Rubric? the second question is, whether it is contrary to the express directions of the Rubric?

On the former question their Lordships observe that whether the Water mingled with the Wine be used, because Christ himself is believed to have used it, or in order to symbolise the water from the rock given to the thirsty Israelites, or the blood and water from the side of our Lord, or the union of Christ with His People (the water being a type of the People), or the union of two natures in the one Lord, it can scarcely be said that the reception of the mingled chalice had no share in this symbolism, but only the act of mingling. Their Lordships are unable to arrive at the conclusion that, if the mingling and administering in the service Water and Wine is an additional ceremony, and so unlawful, it becomes lawful by removing from the service the act of mingling, but keeping the mingled Cup itself and administering it. But neither Eastern nor Western Church, so far as the Committee is aware, has any custom of mixing the Water with Wine apart from and before the service.

As to the second question, the addition of Water is prescribed in the Prayer Book of 1549; it has disappeared from all the later Books, and this omission must have been designed. The Rubric of 1662, following that of 1604, says "The Bread and Wine for the Communion shall be provided by the Curate and Churchwardens at the charges of the Parish." So far Wine, not mixed with Water, must be intended. The Priest is directed in the Rubric before the Prayer for the Church Militant to place on the table "so much bread and wine as he shall think sufficient." Of so much of this Wine as may remain unconsecrated it is said that "the Curate shall have it to his own use." These directions make it appear that the Wine has not been mingled with Water but remains the same throughout. If the Wine had been mingled with Water before being placed on the Table, then the portion of it that might revert to the Curate would have undergone this symbolical mixing; which cannot surely have been intended.

Their Lordships gladly leave these niceties of examination, to observe, that they doubt whether this part of the Article is of much importance. As the learned Judge has decided, that the act of mingling the Water with the Wine in the service is illegal, the private mingling of the Wine is not likely to find favour with any. Whilst the former practice has prevailed both in the East and the West, and is of great antiquity, the latter practice has not prevailed at all; and it would be a manifest deviation from the Rubric of the Prayer Book of *Edward* VI. as well as from the exceptional practice and directions of Bishop *Andrews*. Upon this sixteenth Article, however, whether it be more or less important, their Lordships allow the appeal, and will advise that a Monition should issue against the Respondent.

The twentieth Article charges the Respondent with using on divers occasions "Wafer Bread, being Bread made in the special shape and fashion of circular Wafers, instead of Bread such as is usual to be eaten," and with administering the same to the Communicants. The Rubric of the Prayer Book now in force runs thus: "And to take away all occasion of dissension, and superstition, which any person hath or might have concerning the Bread and Wine, it shall suffice that the Bread be such as is usual to be eaten; but the best and purest Wheat Bread that conveniently

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may be gotten." This is the same with the Rubrics of 1552, 1559, and 1604, with two exceptions. The present Rubric omits after "eaten" the words "at the Table with other meats," and it introduces words which have been prominent in the argument in this case. Instead of "to take away the superstition," it reads "to take away all occasion of dissension and superstition." In the first Book of *Edward* VI. the direction is different: "For avoiding all matter and occasion of dissension, it is meet that the Bread prepared for the Communion be made, through all this realm, after one sort or fashion; that is to say, unleavened, and round, as it was afore, but without all manner of print, and something more larger and thicker than it was, so that it may be aptly divided in divers pieces; and every one shall be divided in two pieces, at the least, or more, by the discretion of the Minister, and so distributed." One of the *Elizabethan* Injunctions (of 1559) is at variance with the *Elizabethan* Rubric, continued from the second Book of King *Edward*, and provides as follows: "Where, also, it was, in the time of King *Edward* VI., used to have the Sacramental Bread of common fine Bread, it is ordered for the more reverence to be given to these holy mysteries, being the Sacraments of the body and blood of our Saviour Jesus Christ, that this same Sacramental Bread be made and formed plain, without any figure thereupon, of the same fineness and fashion round, though somewhat bigger in compass and thickness, as the usual Bread and Wafer heretofore named singing cakes, which served for the use of the private Mass:" *Cardwell*, Doc. Ann. vol. i., p. 202 [Ed. 1839]. The learned Judge calls this Injunction a "*contemporanea expositio*" of the Rubric, but it is in fact a superseding of the Rubric, nor can it be regarded as at all reconcilable with it. Upon these facts the learned Judge decides as follows: "It appears, therefore, that while the first Rubric prescribed a uniformity of size and material, the later and the present Rubric are contented with the order that the purest wheaten Flour shall suffice, and the Bread may be leavened according to the use of the Eastern, or unleavened according to the use of the Western, Church" (1).

Their Lordships do not find any mention of Flour, and, apart from this slight inadvertence, their Lordships are unable to accept

(1) Law Rep. 3 A. & E. 103.

this view of the passages that have been quoted. The first Book of *Edward* has in view uniformity of practice, and not the choice of two practices: the bread is to be made "through all this realm after the same sort and fashion." The second Book of *Edward* VI. is not so positive in form, for the words "it shall suffice" are used; but it produced uniformity, and not diversity, for the Injunction of 1559 says: "It was, in the time of King *Edward* VI., used to have the Sacramental bread of common fine Bread." This general use the Injunction proposes to change; but, again, the Order is universal, and binds the very minutest details: the Bread is to be plain without any figure, fashioned round, but somewhat bigger in compass and thickness than the Cakes used in private Masses. There is no trace of an intention to leave men free to follow the fashion of the Eastern, or of the Western Church. So there are three distinct Orders: first, for Wafer Bread, unleavened as before, but larger and without print; then for common Bread usual at the Table; then for a new kind of Bread thicker than the Wafer, and without symbolical figures: and the first and last are in their form universal and absolute; and the second also had brought about a general usage, and not a diversity. There was, no doubt, a great division of opinion upon this question, and this makes it all the more remarkable, that none of the three Orders takes the natural course of leaving the matter free. Each seems to have aimed at uniformity, but each in a different practice.

But it has been argued by some that the phrase "it shall suffice" implies a permission; that the words may mean "it shall be sufficient, but another usage is allowed and might even be better." On the other hand, it has been argued, that in other places in the Liturgy "it shall suffice" must be construed into a positive direction; that if "it shall suffice" to pour Water on a sickly child, this ought to restrain the Clergyman from immersing a child known to be sickly; that even the weaker form "it may suffice" in the Rubric, as to Children and infants brought to be baptized, conveys to the Minister a distinct direction as to what he is to do, and leaves no alternative course apparent; that "it shall suffice that the Litany be once read" for both Deacons and Priests is meant to be, and is received as, a positive order; and that in such cases "it shall suffice" means "it shall be sufficient

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for the completeness of a Sacrament or for the observance by the Minister of the Rubric." Their Lordships are disposed to construe this phrase in each case according to the context. Here the expression is "to take away all occasion of dissension and superstition . . . it shall suffice." If these words left the whole matter open, and only provided that the usual Bread should be sufficient where it happened to be used, it is difficult to see how either dissension or superstition would be taken away: not dissension, for there would be a licence that had not existed since the Reformation; nor superstition, for the old Wafer with its "print," its "figures," which the first Book of *Edward* and the Injunctions desired might be excluded, might now be used if this Rubric were the only restraint. Their Lordships are therefore inclined to think on this ground alone that the Rubric contains a positive direction to employ at the Holy Communion, the usual Bread.

It is at least worthy of notice that when *Cosin* and others, at the last revision, desired to insert the words making the Wafer also lawful, these words were rejected.

But their Lordships attach greater weight to the exposition of this Rubric furnished by the history of the question. From a large collection of Visitation Articles, from the time of *Charles* II., it is clear that the best and purest wheat Bread was to be provided for the Holy Communion, and no other kind of Bread. They believe that from that time till about 1840 the practice of using the usual wheat Bread was universal.

The words of the 20th Canon, to which the Visitation Articles refer, point the same way. The Churchwardens are bound to supply "wheaten bread," and this alone is mentioned. If Wafer bread is equally permitted, or the special cakes of *Edward* VI.'s first Book, and of the Injunctions, it is hard to see why the Parish is to supply wheaten Bread, in cases where Wafers are to be supplied by the Minister or from some other source. And if Wafers were to be in use, a general Injunction to all Churchwardens to supply wheaten Bread would be quite inapplicable to all Churches where there should be another usage.

Upon the whole, their Lordships think, that the law of the Church has directed the use of pure wheat Bread, and they must so advise Her Majesty.

It remains to consider part of the 17th Article of Charge, which sets out that the Respondent, during the whole of the Prayer of Consecration at the Holy Communion, "stood at the middle of that side of the Holy Table which, if the said Holy Table stood at the east end of the said Church or Chapel (the said Table in *St. James's Chapel*, in fact, standing at the west end thereof), would be the west side of such table, in such wise that you then stood between the People and the said Holy Table, with your back to the People, so that the People could not see you break the Bread or take the Cup into your hand." The learned Judge deals with this charge very briefly, believing it to have been settled by thi Committee in the judgment in *Martin* v. *Mackonochie*. He says, "I must observe that the Rubric does not require that the People should see the breaking of the Bread, or the taking of the Cup into the Priest's hands; and, if it did so prescribe, the evidence in this case would establish that all the Congregation could see him take the Cup into his hand, and some of them at least could see him break the Bread" (1). The Rubric on this point is this: "When the Priest, standing before the Table, hath so ordered the Bread and Wine, that he may with the more readiness and decency break the Bread before the People, and take the Cup into his hands, he shall say the Prayer of Consecration, as followeth." Their Lordships are of opinion that these words mean, that the Priest is so to stand that the people present may see him break the Bread and take the Cup into his hands; although the learned Judge is right, if he means to say that the mere words do not speak of seeing.

Their Lordships think that the evidence of the Witness, *Verrall*, which there is no reason to doubt; proves that "generally the congregation could not see" the breaking of the Bread, because the Respondent had his back turned to them. As regards the Cup, the Witness said that they could see him take the Cup into his hand, but being asked further, he says, "I could tell he was taking the Cup into his hand." This is consistently explained by supposing that the witness and others could see a certain motion of the Respondent which from their knowledge of the service, and from the subsequent elevation, they were sure was the taking of the Cup

(1) Law Rep. 3 A. & E. 109.

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into his hands. It would probably be impossible in any position so to act that all the congregation could see, or that all should be unable to see; but we take it as proved that the greater part of the congregation could not see the breaking of the Bread or the act of taking the Cup into the hands.

The facts being established, their Lordships proceed to consider the question itself. In default of argument on the Respondent's side, they have been somewhat aided by a large mass of controversial literature, which shews how much interest this question excites, and which has probably left few of the facts unnoticed.

The Rubric upon the position of the Table, directs that it shall "stand in the body of the Church or in the Chancel, where morning and evening prayer are appointed to be said." This is the same as the Rubrics of 1552, 1559, and 1604, excepting the verbal alteration of "*are*" for "*be*." It goes on, "And the Priest standing at the north side of the Table, shall say the Lord's Prayer with the Collect following." The Table is a moveable Table. By the injunctions of Queen *Elizabeth* (*Cardwell*, Doc. Ann. Vol. I., p. 201) it is ordered "that the Holy Table in every Church be decently made, and set in the place, where the Altar stood, and there commonly covered, as thereto belongeth, and as shall be appointed by the Visitors, and so to stand, saving when the Communion of the Sacrament is to be distributed; at which time the same shall be so placed in good sort within the Chancel, as whereby the Minister may be more conveniently heard of the Communicants in his prayer and ministrations, and the Communicants also more conveniently and in more number communicate with the said Minister. And after the Communion is done, from time to time the same Holy Table to be placed where it stood before." If this custom still prevailed of bringing the Table from the east and placing it in the Chancel, the two Rubrics would present no difficulty. The Priest standing on the north side, as directed by the one, would also be standing before the Table so as to break the Bread before the People, and take the Cup into his hand as required by the other. No direction was given for a change of position in the Prayer of Consecration in the second Book of King *Edward* VI., but only a change of posture in the words "standing up." But before the time of the Revision of 1662, the custom of placing the

Table along the east wall was becoming general, and it may fairly be said that the Revisers must have had this in view.

The following questions appear to require an answer, in order to dispose of this part of the case; what is meant by "the north side of the Table?" What change, if any, is ordered by the Rubric before the Prayer of Consecration? And what is the meaning of "before the People" in that Rubric?

As to the first question, their Lordships are of opinion that "north side of the Table" means that side which looks towards the north.

They have considered some ingenious arguments intended to prove that "north side" means that part of the west side that is nearest to the north. One of these is that the middle of the Altar before the Reformation, was occupied by a stone or slab, called *mensa consecratoria* and *sigillum altaris*, that the part of the Altar north of this was called north side, and that to the south of it was called the south side. Without inquiring whether English Altars were generally so constructed, which is to say, the least, doubtful, their Lordships observe that in the directions for the substitution of a moveable Table for the Altar, and for its decent covering, and its position at various times, there is no hint that this is to revive the peculiarity of the Altar which it replaced; and they do not believe that the Table was so arranged or divided.

Another argument is drawn from the Jewish Ritual. On offering sacrifices before the Lord, the Altar was to be sprinkled with the blood, and a red line was drawn across the altar to mark the height at which it should be sprinkled; and it is argued that the line being only in front, the Priest must have stood in front in order to see it and be guided by it. But on the other hand the line probably went all round the Altar, and the sprinkling was applied to all the sides. And even if the fact was rightly stated, it would be impossible to allow an argument so remote and shadowy to supersede the plain sense of a direction so clear in itself. When the Table was placed in the body of the Church or the Chancel, the Priest or Minister was to stand on the north side of it, looking south.

When it became the custom to place the Table altarwise against the east wall, the Rubric remained the same. And there are many authorities to shew, that the position of the Minister was still upon the north side or end, facing south. It is only necessary

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to cite a few. Archdeacon *Pory* (1662), in his Visitation Articles, says: "The Minister standing, as he is appointed, at the north side or end of the Table when he celebrates the Holy Communion." In the dispute between the Vicar of *Grantham* and his parishioners (1627), Bishop *Williams* plainly shews that whichever way the Table was to stand, which was the matter in dispute, the position of the Minister was on the north. "If you mean by altarwise that the Table shall stand along close by the wall, so that you be forced to officiate at one end thereof (as you may have observed in great men's Chapels), I do not believe that ever the Communion Tables were otherwise than by casualty so placed in country Churches." He also says: "I conceive the alteration was made in the Rubric, to shew which way the Celebrant was to face:" *Heylin*, Coale from the Altar, and *Williams*, Holy Table. *Heylin* says, quoting the Latin Prayer Book of 1560: "I presume that no man of reason can deny but that the northern end or side, call it which you will, is *pars septentrionalis*, the northern part." ("Coale from the Altar.") When Bishop *Wren* was impeached in the House of Lords, A.D. 1636, for consecrating the Elements on the west side of the Table, he answered that he stood on the north side at all the rest of the service except at the Prayer of Consecration. "He humbly conceiveth it is a plain demonstration that he came to the west side only for the more conveniency of executing his office, and no way at all in any superstition, much less in any imitation of the Romish priests, for they place themselves there at all the service before, and at all after, with no less strictness than at the time of consecrating the bread and wine:" *Nicholls*, Commentary on Common Prayer (published 1710); *Bennett*, Annotations on Book of Common Prayer (1708); *Wheatley*, Rational Illustrations of Common Prayer (1710), confirm the view that when the table was placed east and west, the Minister's position was still on the north.

Their Lordships entertain no doubt whatever that when the Table was set at the east end the direction to stand at the north side was understood to apply to the north end, and that this was the practice of the Church.

It will be convenient to consider next what is the meaning of the words "before the People," in the Rubric, before the Consecra-

tion Prayer. *Nicholls* (*Op. cit.*) observes: "To say the Consecration Prayer (in the recital of which the Bread is broken) standing before the Table, is not to break the Bread before the People; for then the People cannot have a view thereof, which our wise Reformers, upon very good reasoning, ordered that they should." That stress was laid on this witness of the people of the act of breaking, appears by other passages; for example, *Udall* says: "We press the action of breaking the Bread against the Papist. To what end, if not that the beholders might thereby be led unto the breaking of the Body of Christ:" "Communion Comeliness" (1641). *Wheatley* (*Op. cit.*) says: "Whilst the Priest is ordering the Bread and Wine, he is to stand before the Table; but when he says the Prayer, he is to stand so that he may with more readiness and decency break the Bread before the People, which must be on the north side. For if he stood before the Table, his body would hinder the People from seeing, so that he must not stand there, and consequently he must stand on the north side, there being, in our present Rubric, no other place for the performance of any part of this office."

Their Lordships consider that the Respondent, in standing with his back to the people, disobeyed the Rubric, in preventing the People from seeing the breaking of the Bread.

The north side being the proper place for the Minister throughout the Communion office, and also whilst he is saying the Prayer of Consecration, the question remains, whether the words "standing before the Table" direct any temporary change of position in the Minister before saying the Prayer of Consecration? This is not the most important, but it is the most difficult question. One opinion is that of *Wheatley*, who interprets the Rubric as sending the Priest to the west side of the Table to order the Elements, and recalling him for the Prayer itself. This, however, would be needless if the Elements were so placed on the Table as that the Priest could, "with readiness and decency," order them from the north side, as is often done.

It would also be needless in any case, where the Communion Table was placed in the body of the Church, or in the Chancel with its ends east and west. And though this position is not likely now to be adopted, the question is, whether that was the

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law at the time this Rubric was drawn. Now, the Rubric prescribes that the Table shall stand "in the body of the Church or in the Chancel where Morning and Evening Prayers are appointed to be said;" and there are two cases, which occurred in 1633, those of *Crayford* (*Cardwell*, Doc. Ann., vol. ii. 226), and *St. Gregory's, London* (*Ibid.* ii. 237), which shew that the Table, though placed at the east end, might be moved for convenience' sake and under competent authority. This, too, is the view of Bishop *Wren* in 1636 (*Ibid.* ii. 252), "That the Communion Table in every Church do always stand close under the east wall of the Chancel, the ends thereof north and south, unless the Ordinary give particular directions otherwise." Should the Table be placed with its ends east and west, it would be absurd to enforce a rule that the Priest should go to the west end to order the Elements, seeing the north side would be in every way more convenient.

Upon these facts their Lordships incline to think, that the Rubric was purposely framed so as not to direct or insist on a change of position in the Minister, which might be needless; though it does direct a change of posture from kneeling to standing. The words are intended to set the Minister free for the moment, from the general direction to stand at the north side, for the special purpose of ordering the Elements; but whether for this purpose he would have to change the side or not is not determined, as it would depend on the position of the Table in the Church or Chancel, and on the position in which the Elements were placed on the Table at first. They think that the main object of this part of the Rubric is the ordering of the Elements; and that the words "before the Table" do not necessarily mean "between the Table and the People," and are not intended to limit to any side.

The learned Judge in the Court below, in considering the charge against the Respondent that he stood with his back to the People during the Prayer of Consecration, briefly observes "the question appears to me to have been settled by the Privy Council in the case of *Martin* v. *Mackonochie* (1)." The question before their Lordships in that case was as to the posture and not as to the position of the Minister. The words of the judgment are: "Their Lordships entertain no doubt on the construction of this Rubric" [before

(1) Law Rep. 3 A. & E. 109.

the Prayer of Consecration] "that the Priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versâ ;* and it appears to them equally certain that the Priest is intended to stand and not to kneel. They think that the words 'standing before the Table' apply to the whole sentence ; and they think this is made more apparent by the consideration, that acts are to be done by the Priest before the people, as the prayer proceeds (such as taking the Paten and Chalice into his hands, breaking the Bread, and laying his hand on the various Vessels) which could only be done in the attitude of standing" (1).

This passage refers to posture or attitude from beginning to end, and not to position with reference to the sides of the Table. And it could not be construed to justify Mr. *Purchas* in standing with his back to the People, unless a material addition were made to it. The learned Judge reads it as if it ran, "They think that the words 'standing before the Table' apply to the whole sentence, and that before the Table means between the Table and the People on the west side." But these last words are mere assumption. The question of position was not before their Lordships; if it had been, no doubt the passage would have been conceived differently, and the question of position expressly settled.

Upon the whole, then, their Lordships think that the words of Archdeacon, afterwards Bishop, *Cosin* in A.D. 1687, express the state of the Law, "Doth he [the Minister] stand at the north side of the Table, and perform all things there, but when he hath special cause to remove from it, as in reading and preaching upon the Gospel, or in delivering the Sacrament to the communicants, or other occasions of the like nature:" Bishop *Cosin's* Correspondence, part i. p. 106 : *Surtees* Soc. Pub.) They think that the prayer of Consecration is to be used at the north side of the Table, so that the Minister looks south, whether a broader or a narrower side of the Table be towards the north.

It is mentioned that Mr. *Purchas'* Chapel does not stand in the usual position, and that, in fact, he occupied the east side when he stood with his back towards the People. If it had happened, as it does in one of the Chapels Royal, that the north side had been

(1) Law Rep. 2 P. C. 382.

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where the west side usually is, a question between the letter and the spirit of the Rubrics would have arisen. But the Respondent, seems to us to have departed both from the letter and the spirit of the Rubrics; and our advice to Her Majesty will be that a Monition should issue to him as to this charge also.

As all the charges have been proved against the Respondent, except as to two less important particulars, we direct that he shall pay the costs in this Court and in the Court below.

Proctors for the Appellant: *Moore & Currey.*

J. C.* 1871 *March* 25.

HENRY HEBBERT . . . . . APPELLANT;

AND

THE REV. JOHN PURCHAS . . . . . RESPONDENT.

IN THE MATTER OF THE PETITIONS OF PURCHAS FOR THE RE-HEARING OF THE APPEAL.

Practice—Petition to Her Majesty for re-hearing—Reference to the Judicial Committee.

After judgment had been delivered by the Judicial Committee, but before their report and recommendation had been presented, or any Order made thereon by Her Majesty in Council, the Respondent presented two Petitions addressed to Her Majesty in Council, stating that the appeal had been heard *ex parte* by reason of his want of pecuniary means to employ Counsel, and his own inability to argue the case; and that (as he alleged) the judgment of the Judicial Committee in the appeal was at variance with former decisions of the Judicial Committee; he prayed for a re-hearing of the Appeal, and that no report or recommendation might be made thereon to Her Majesty until such re-hearing had been had. Both Petitions having been specially referred by Her Majesty to the Judicial Committee, their Lordships, after hearing Counsel, declined to entertain the matter of the Petitions, or to allow any doubt to be thrown on the finality of the decisions of the Judicial Committee; and dismissed the Petitions with costs.

BEFORE the report of the opinion and judgment of their Lordships in the above appeal had been presented to Her Majesty in Council, or any Order made in accordance with the advice and re-

* *Present*—THE LORD CHANCELLOR (LORD HATHERLEY), THE BISHOP OF LONDON (DR. JACKSON), LORD CHELMSFORD, LORD WESTBURY, LORD CAIRNS, and SIR JAMES WILLIAM COLVILE.

commendation of their Lordships' judgment, a Petition, dated the 15th of March, 1871, was presented by the Respondent, addressed to Her Majesty in Council, which stated that the Petitioner was disabled, by want of necessary pecuniary means, from incurring the expense of a defence by Counsel on the hearing of such appeal; and that the state of his health, and his own incompetency to cope with Counsel, prevented him from venturing personally to undertake to sustain the judgment of the Dean of the Arches; that the appeal was thus heard without any opposing arguments on the various important points raised; and, therefore, that the report of the Judicial Committee on those important points, from the necessity of the case, must be submitted to Her Majesty upon an *ex parte* hearing only. That, as he stated, the result of these circumstances was, that the opinion of the Judicial Committee had been pronounced, with regard to the main particulars, in favour of the Appellant, in contradiction, as he, the Petitioner, was advised, in one essential point, to the decision of the Judicial Committee in the case of *Westerton* v. *Liddell* (1). That so grave were the consequences of the decision in the case to which the Petitioner was a party, and so deep and painful an interest had, as he submitted, it excited amongst a very large body of Clergy and Laity of the Church of *England*, that, being now unexpectedly enabled to take upon himself the expense of employing Counsel on his behalf, which at the time of the hearing he was unable to do, and being, as he alleged, most anxious for the sake of himself and others that a full and complete discussion should be had of the several points raised by the appeal, he prayed that Her Majesty would not adopt the recommendation of the Lords of the Judicial Committee in the case until an opportunity had been afforded to the Petitioner of having the case reheard, in order that he might be duly represented by Counsel upon such rehearing, and a full and satisfactory discussion might be had on the several points raised by the appeal.

On the 17th of March, 1871, an appearance for the first time was entered on behalf of the Respondent, in Her Majesty's Court of appeal, in the original appeal

This Petition having been set down for hearing before the Judicial Committee, notice was issued from the Privy Council

(1) Moore's Special Report.

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Office for the Petitioner to appear before the Committee, as upon the hearing of an ordinary petition.

The *Solicitor-General* (Sir *John D. Coleridge*, Q.C.), with whom was Mr. *C. Bowen*, on behalf of the Petitioner,

Took a preliminary objection to the competency of the Court, to entertain the petition. He submitted that the Petition was not a petition in the appeal addressed to the Judicial Committee, but a Petition for a rehearing addressed to the Queen in Council, and that unless such Petition was referred by Her Majesty to their Lordships by a special Order in Council, in accordance with the provisions of the *Judicial Committee Act*, 3 & 4 Will. 4, c. 41, sect. 4, the Judicial Committee, being only a Statutory Court, had no authority, and that the case was, in fact, as regarded the Tribunal then sitting, *coram non judice*. He submitted, that the Petition, being addressed to the Queen in Council, was not a proceeding in the appeal then lately before the Judicial Committee, so as to bring it within the provisions of the Statute, 7 & 8 Vict. c. 69, s. 9, and obviate a special reference; that the Petition for a re-hearing having been presented to Her Majesty in Council, involved an appeal, not to the Judicial Committee against their own report or judgment, but to the discretion and prerogative of the Crown. He further submitted, that Her Majesty, if so advised, might refer the Petition to this, or any other section of the Judicial Committee, but until such reference had been specifically made, the Judicial Committee could have no authority to proceed, or take cognizance of the matter of the Petition, and advise Her Majesty, under the circumstances, that a further hearing ought, or ought not to take place.

THE LORD CHANCELLOR intimated the opinion of their Lordships, that, as it was insisted there was no Petition for a rehearing before them, it was unnecessary further to discuss the matter.

ON the 29th of March, 1871, Mr. *Purchas* presented another Petition to Her Majesty in Council, in which he stated, in effect, that he had, at the hearing of the last Petition, for the first time discovered that no special Order had been made by Her Majesty

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referring his Petition for a rehearing of his original appeal to the Judicial Committee; that he was advised by Counsel, that to proceed with any motion before the Judicial Committee until a special Order of reference had been made by Her Majesty in Council in the matter of his Petition might be to his prejudice; that accordingly no motion for a rehearing was made on the day named in the aforesaid notice, the Petitioner's Counsel informing their Lordships of the reasons why it was thought necessary to abstain from any such motion; and the Petitioner urged in favour of the rehearing of his case the grounds before stated by him; and further, that if the draft report or recommendation, as delivered and proposed by the Committee, were made and adopted by Her Majesty, the Petitioner would be condemned in a Criminal suit with heavy costs for doing what, he was prepared to submit, was not illegal; and he prayed, in effect, that the appeal of "*Hebbert* v. *Purchas*" might be reheard before the Judicial Committee, and that until such rehearing had been had, their Lordships might abstain from making to Her Majesty any report or recommendation in the matter of the appeal, or any report thereof be received or adopted by Her Majesty; and that he might be heard by Counsel upon the matter of both Petitions presented by him.

J. C.* 1871 *April* 26.

This Petition, together with the former one of the 15th of March, 1871, having been specially referred by Her Majesty to the Judicial Committee to report thereon, now came on for hearing.

The *Solicitor-General* (Sir *John D. Coleridge*, Q.C.), and Mr. *C. Bowen*, in support of the application:—

The opinion and judgment of the Judicial Committee on an appeal referred to them is not necessarily a final judgment; it is competent, we apprehend, to the Committee to reconsider the case, especially when no report or recommendation has been made thereon to Her Majesty in Council. The Judicial Committee is constituted, and its jurisdiction defined, by Statute, 3 & 4 Will. 4, c. 41, which limits the power of the Committee simply to advising the Crown.

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), THE BISHOP OF LONDON (DR. JACKSON), LORD CHELMSFORD, LORD WESTBURY, LORD CAIRNS, SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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By the 2 & 3 Will. 4, c. 92, s. 2, the High Court of Delegates was abolished and its powers transferred to the Queen in Council. The 3rd section declares, "that every Judgment, Order, and Decree to be made by the King's Majesty, his Heirs and Successors, shall have such and the like force and effect in all respects whatsoever as the same respectively would have had if made and pronounced by the High Court of Delegates; and that every such Judgment, Order, and Decree shall be final and definitive, and no Commission shall thereafter be granted or authorized to review any Judgment or Decree to be made by virtue of that Act." That Statute, and the *Privy Council Act*, 3 & 4 Will. 4, c. 41, are in *pari materiâ*, and to be taken in relation with the Statutes for restraint of appeals, 24 Hen. 8, c. 12; and 25 Hen. 8, c. 19, ss. 1, 2, 3. The Statutes, 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, were, in part, repealed by the 1 & 2 P. & M. c. 8, s. 11, but the subsequent Statute, 8 Eliz., c. 5, "For avoiding tedious suits in Civil and Marine causes," enacts, "that all and every such Judgment and Sentence definitive, as shall be given or pronounced by any Civil or Maritime Court upon appeal lawfully to be made thereon to the Queen's Majesty in Her Highness Court of Chancery, by such Commissioners or Delegates, shall be final, and no further to be had or made from the said Judgment or Sentence definitive, or from the said Commissioners, or Delegates for or in the same; any law, usage, or custom to the contrary notwithstanding." Although it declared that the Sentence of the High Court of Delegates is definitive, yet it is laid down by *Coke*, 4th Inst. 135, and *Bla.* Com. Vol. 3, p. 67, that the Crown may grant a Commission of Review notwithstanding the Statutes, 25 Hen. 8, c. 19, and the 8 Eliz. c. 5, declare the Sentence of the Court of Delegates is to be final: *Gervis* v. *Hallewel* (1), referring to *Moor*, 462, 782; *Hob.* 146; *Mathews* v. *Warner* (2); where a list of the cases in which Commissions of Review had been granted, is set out: *Eagleton* v. *Kingston* (3). In *Ex parte Fearon* (4), it is laid down, that the prerogative of granting a Commission of Review is to be exercised in the peculiar circumstances and importance of each particular case. The practice of granting a Commission of Review was uniform

(1) Cro. Eliz. 571.
(2) 4 Ves. 186.
(3) 8 Ves. 438.
(4) 5 Ves. 633.

till the abolition by the 2 & 3 Will. 4, c. 92, of the High Court of Delegates. The necessity for a Commission of Adjuncts only arose when the Court of Delegates were equally divided in opinion: Rep. on the Prac. and Jur. of the Ecc. Courts, 1832, p. 21. As neither the Statutes, 3 & 4 Will. 4, c. 41, 3 & 4 Vict. c. 86, and 6 & 7 Vict. c. 38, affected the prerogative of the Crown, we submit, that the same prerogative and power to issue a Commission of Review of a judgment of the Judicial Committee exists now in the Crown as it had before the Statute, 2 & 3 Will. 4, c. 92, from the Sentence of the High Court of Delegates, and that the Statute, 3 & 4 Will. 4, c. 41, enables Her Majesty to refer this case to the same Committee, or, if need be, to a new Committee. [LORD CAIRNS:—That proposition involves this consequence, that the Judicial Committee would have three functions to discharge—to advise the Sovereign; to advise whether Her Majesty in Council should send its recommendation back for reconsideration; and then, if it so advised, to again advise Her Majesty in Council after reconsideration.] A rehearing, even after an Order in Council confirming the report of the Judicial Committee, has been allowed: *Rajundernarain Rae* v. *Bijai Govind Sing* (1); *Dumaresq* v. *Le Hardy* (2); *The Singapore* (3). This latter case refers to all the authorities (4) on that head, and abundantly establishes the proposition that rehearings are a matter in the discretion of an appellate Court constituted like the Judicial Committee. [THE LORD CHANCELLOR:—The House of Lords, in *Bright* v. *Hutton* (5), a case relating to the liability of contributories of a Company under the Winding-up Acts, came to a different conclusion upon the same facts to that they had declared in *Hutton* v. *Upfill* (6).] In this case we urge, and are prepared to argue, that conflicting judgments bearing on the subjects at issue have been pronounced by former members of this Tribunal, as in *Westerton* v. *Liddell* (7), and *Martin* v. *Mackonochie* (8). On these grounds, and also as the hearing of the case was *ex parte*, we submit, that a rehearing ought to be allowed on the grounds: first, that the decisions are conflicting; secondly, that

(1) 1 Moore's P. C. Cases, 117.
(2) Ibid. 127.
(3) Law Rep. 1 P. C. 378.
(4) Ibid. 388.
(5) 3 H. L. C. 341.
(6) 2 H. L. C. 674.
(7) Special Report of the cases of *Westerton* v. *Liddell* and *Beal* v. *Liddell*, by *E. F. Moore*, 8vo. Lond. 1857.
(8) Law Rep. 2 P. C. 365.

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the case was heard *ex parte*, as the Petitioner did not appear at the hearing for want of funds; and, lastly, on public expediency, as the conscience of a large number of the Clergy of the Church of *England* was unsettled by the decision. If no rehearing is possible, the decision will be final, unless set aside by Act of Parliament.

Mr. *A. J. Stephens*, Q.C., and Mr. *T. D. Archibald*, for the Appellant, *contrà*:—

The Statute, 2 & 3 Will. 4, c. 92, sect. 2, transferred the powers of the High Court of Delegates to the Queen in Council, and also abolished the Commission of Review. In the report of the Ecclesiastical Commissioners of 1832, p. 20, it is expressly stated, that from the decision of the High Court of Delegates no further appeal lies as a matter of right, and that although the unsuccessful party might present a petition to His Majesty in Council for a Commission of Review, yet that it was very rarely that the facts of a case warranted the exercise of the royal prerogative. By the Statute, 3 & 4 Will. 4, c. 41, this Tribunal is constituted the ultimate Court of appeal in Ecclesiastical causes, having the same authority and jurisdiction as was possessed by the Court of Delegates, except the power of granting a Commission of Review, which is expressly taken away by the 2 & 3 Will. 4, c. 92, sect. 3. A rehearing of an Appeal is contrary to the constitution of the House of Lords, even if the case was wrongly decided, and was so held in *Stewart* v. *Agnew* (1), and the same rule has been adopted by this Court in *The Singapore* (2). The Court of Queen's Bench will not, on a suggestion of error in the decision of this Tribunal, issue a *Mandamus* to the Privy Council to receive a petition for a rehearing of an Appeal decided by this Tribunal: *Ex parte Smyth* (3). The object of these Petitions is to resuscitate the old Commission of Review, which proved so pernicious in its working and results as to lead to its positive abolition by Statute. The Judicial Committee is, by Statute, a Court of Law fully constituted, and capable of enforcing an Order in Council made or an Appeal, and punishing for Contempt. Even if a rehearing was granted, and judgment given in favour of the Petitioner, the inevitable consequence would be that the Appellant would then have

(1) 1 Shaw, Sc. App. Cases, 432–3. (2) Law Rep. 1 P. C. 378, 388.
(4) 3 Ad. & E. 719.

a right to present a Petition to the Queen in Council urging that conflicting judgments had been given, and, therefore, that it was necessary to rehear the case again. To allow a rehearing of a judgment of the appellate Court upon a question of Church doctrine solemnly decided would be most mischievous. The judgment is in conformity with the principles laid down in *Westerton* v. *Liddell* (1) and *Martin* v. *Mackonochie* (2).

The *Solicitor-General* replied.

THE LORD CHANCELLOR:—

Their Lordships are of opinion, in respect of the two Petitions addressed to the Crown, that no further proceedings should be taken therein. Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion, that expediency requires that the prayer of the Petitions should not be acceded to, and that they should be refused with costs.

Three separate Orders were made by Her Majesty in Council on the 16th of May, 1871, upon the Appeal and the two Petitions.

The Order in Council made on the first and principal Appeal set forth, that their Lordships had "agreed humbly to report to Her Majesty their opinion in favour of the said Appeal; that the Decree or Order appealed from ought to be amended to the extent hereinafter mentioned; that the principal Cause ought to be retained, and therein that, in addition to the matters in respect of which the said *John Purchas* was by the Decree appealed from pronounced to have offended, and from the use of or sanctioning the use of which he was thereby admonished to abstain, he, the said *John Purchas*, ought to be pronounced to have offended against the Statute Law and the Constitutions and Canons Ecclesiastical of the realm by himself using and wearing a Vestment called a *Chasuble* while officiating in the Communion Service and in the administration of the Holy Communion in the said Church or Chapel of *St. James*,

(1) Special Report of the cases of *Westerton* v. *Liddell* and *Beal* v. *Liddell*, by E. F. Moore, 8vo. Lond. 1857.

(2) Law Rep. 2 P. C. 365.

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at *Brighton;* and by sanctioning and authorizing, whilst present, and responsible for the due performance of Divine Service, the wearing of a *Chasuble* by other Clergymen whilst officiating in the Communion Service, and in the administration of the Holy Communion in the said Church or Chapel; and by himself wearing, when officiating in the Communion Service, a vestment called an *Alb,* and by causing or suffering other Clergy officiating or assisting at the Communion Service, in his presence, to wear certain vestments called *Tunics, Tunicles,* and *Albs;* and by administering Wine mixed with Water, instead of Wine, to the Communicants at the Lord's Supper; and by the use in the said Church or Chapel, in the administration of the Holy Communion, of Wafer Bread instead of Bread such as is usual to be eaten; and by standing in the said Church or Chapel with his back to the People, between the People and the Holy Table, whilst reading the Prayer of Consecration in the Holy Communion; and that he, the said *John Purchas,* ought to be admonished to abstain from the use of, or sanctioning the use of, the rites, ceremonies, acts, observances, matters or things, as well those in which he has been pronounced by the aforesaid Decree of the Court below to have offended, as those in which their Lordships did report that he had also offended; and that a Monition admonishing him accordingly ought to be issued out of the Seal of Her Majesty in Ecclesiastical and Maritime causes; and further, that he, the said *John Purchas,* ought to be condemned in all the costs incurred in the said cause in the Court below on behalf of the said *Charles James Elphinstone,* and also in the costs incurred in the said appeal on his behalf, and on behalf of the said *Henry Hebbert,* save those incurred in the application of the said *Henry Hebbert* to be admitted and substituted as Promoter in the said appeal, in respect of which no Order was made."

By the Order in Council made on the two petitions of rehearing, it was ordered, "that the Petition of the said *John Purchas* ought not to be granted, and that no further steps ought to be taken in regard thereto."

Proctors for the Appellant: *Moore & Currey.*

Solicitors for the Respondent on the Petitions: *Few & Co.*

OUR SOVEREIGN LADY THE QUEEN . . APPELLANT;

AND

AUGUSTUS McCLEVERTY . . . . . RESPONDENT.

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Feb. 13, 14, 15.

THE "TELEGRAFO" OR "RESTAURACION."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF THE VIRGIN ISLANDS, TORTOLA.

Piracy—Seizure by the Crown of Ship for alleged Piracy—Bonâ fide sale of, before conviction or condemnation—Jurisdiction of Vice-Admiralty Court.

2 P.D. 182

Though goods piratically taken, cannot be transferred to a third party as against their legitimate Owner, yet that rule does not apply to a Ship belonging formerly to a Pirate, as the taint of Piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the Ship through her transfers to various Owners.

A Ship was arrested by the Crown in *Tortola*, on a charge of Piracy. The affidavit which led to the Warrant of arrest alleged, that the Ship was bought at *St. Marc*, in *Hayti*, from a British subject by the Revolutionary Government of *Hayti*, and that the Ship, having been equipped as a Ship of War, was afterwards employed in acts of hostility. It appeared that the Ship had been sold by public auction, six months before seizure, to a *bonâ fide* purchaser, a British subject. The Vice-Admiralty Court of *Tortola* sustained a protest to the jurisdiction of the Court, and decreed restitution of the Ship, but without costs or damages. On appeal, *held*, by the Judicial Committee (affirming such decree), that there was no authority to be derived from principle or precedent, for a Ship sold by public auction to a *bonâ fide* innocent Purchaser, before any proceedings have been taken on the part of the Crown against the Ship, being afterwards arrested and condemned on account of having been engaged previously in piratical acts.

IN this case the appeal was brought from a decree of the Vice-Admiralty Court of the *Virgin Islands*, in a cause promoted on behalf of the Queen, in her Office of Admiralty, against the Steamship *Telegrafo* or *Restauracion*, her tackle, apparel, and furniture, as a forfeiture to Her Majesty, as being the goods of Pirates. The Respondent, of the Island of *Tortola*, one of the *Virgin Islands*, a

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, AND SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY).

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Planter and Merchant, appeared under protest to the jurisdiction of the Court. By this decree the Vice-Admiralty Court confirmed the protest, and decreed restitution of the Ship, which had been arrested under Warrant, at the instance of the Crown, by the Administrator of the Government of *Tortola*, on a charge of Piracy, but without costs and damages.

The facts of the case, as stated in the affidavits, were in substance, as follows:—

The Steamship *Restauracion*, formerly called the *Telegrafo*, was built at *Greenock*, in *Scotland*, in the year 1863. In the month of May, 1869, the revolutionary Government of *Hayti* purchased the Ship at *St. Marc*, in the Island of *Hayti* (a Port then in possession of *Nissage Saget* and the revolutionary Government of *Hayti*, then the established Government of that Country) from a British subject, whereupon the British Consul went on board the Ship and withdrew the British Register, the British Flag, and all papers relating to the Ship as British property. The Haytian authorities at *St. Marc* then went on board of the Ship, and such of the Crew as chose to remain under the nationality she was about to assume were enrolled, and the Haytian flag hoisted. The nationality of the Ship being changed, she received from the revolutionary Government of *Hayti* her commission as a Ship of War, and was placed under the charge of General *Luperon*, General-in-Chief of the National Armies of *San Domingo*, who, in accordance with a convention entered into at the *National Palace* of *St. Marc*, *Hayti*, dated the 11th of March, 1869, proceeded, with the assent, aid, and protection of the revolutionary Government at *Hayti*, to establish a provisional Dominican Government in the northern part of the Republic of *St. Domingo*.

On the 7th of June, 1869, the *Restauracion* entered the Bay of *Samana*, in *San Domingo*, and having communicated with the authorities on shore, and not receiving a reply, hostilities commenced; and after four hours of fighting in the Port and Town of *Samana*, the Town and fortifications, together with the garrison, surrendered to General *Luperon*, and a provisional Government was established in the Town of *Samana*, and the establishment of such Government duly communicated to the Agents of the Revolution abroad. An English Brig, an English Schooner, a Dutch Schooner,

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and an American Schooner, together with several foreign Merchants, were all aided and protected by General *Luperon* and the *Restauracion* while General *Luperon* was so in command of the same. On leaving *Samana* the *Restauracion* proceeded to the port of *Azua;* while there several of the followers of President *Baez* took refuge in the British Schooner *Pomona*. Officers were sent to demand their surrender; but as the Captain of the *Pomona*, an unarmed Vessel, claimed for them the protection of the British Flag, that Flag was respected, and the Dominicans allowed to remain unmolested in the *Pomona*. At no time during the period that the *Restauracion* was engaged in hostilities against the Government of President *Baez* did she pass out of the waters and legal limits of the Dominican Republic, nor did she commit any acts of hostility against the Government of President *Baez* beyond the Municipal jurisdiction of *San Domingo*. On the 6th of July, 1869, the *Restauracion*, having been dismantled as a Ship of War in the Port of *Barahona*, and obtained a Sea pass by the authorities of that Port, was sent on her voyage as a Merchant Vessel for the Ports of *Tortola* and *St. Thomas*, to be put at the disposal of the Agents of the Revolution at those places, carrying a certificate to that effect under the hand of the General Military Commander, countersigned by General *Luperon* and the Manager of Finances *pro tem.*, and also an authority of the same date from General *Luperon* and the other authorities to M. *Domingo Accevedo*, the Captain of the *Restauracion*, then a Merchantman, so as to enable him to transfer, sell, or lease the Ship to Messrs. *Costa, Hermanos, & Co.*, or to such person as they might authorize. The *Restauracion* arrived at the port of *Road Town, Tortola*, on the 12th of July, 1869. Shortly after her arrival she was seized and detained under the authority of the Administrator of the Government of *Tortola*, but was shortly after restored to the Captain by the authorities of the Island. After her restoration the Captain, being largely indebted to the Crew, and the Ship being further liable for necessaries, stores, and supplies, and the Captain unable to pay such liabilities, he, with the authority of the Firm of *Costa, Hermanos, & Co.*, of the Island of *St. Thomas*, placed the Vessel in the hands of one *Shirley*, a licensed Auctioneer in the Colony of *Tortola*, to dispose of the same at public sale. Proper notification of the sale was made

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and circulated by him in the respective Islands of *St. Thomas* and *Tortola*. On the 21st of July, 1869, the *Restauracion* was put up to public sale, when the Respondent, being the highest bidder, became the Purchaser for the sum of $10,025; and upon payment of the purchase-money a Bill of sale of the same was executed by the Auctioneer and Captain of the Ship, by virtue of which the Respondent was put in possession thereof. After the Respondent had been declared Purchaser of the Steamship, he paid to *Shirley* the sum of $501·25c., to be by him paid into the hands of the Treasurer and Comptroller of Customs of the Island of *Tortola*, being the percentage on the purchase-money of such Steamship, under the provisions of an Ordinance of the Island of *Tortola* in such case made and provided; and that sum was paid by *Shirley*, as such licensed Auctioneer, to the Treasurer and Comptroller of Customs of the Island. Some time after such purchase of the Ship by the Respondent she was seized in the port of *Road Town, Tortola*, by the Treasurer and Comptroller of Customs on a charge of piracy. It appeared that after the purchase at public sale, and previous to the arrest, steps were about to be taken to compel the Comptroller of Customs, by *Mandamus*, to grant a British Register to the Steamship; but as *Farrington*, the Comptroller of Customs, was at that time Acting Chief Justice of the Island of *Tortola*, the Counsel of the Respondent, retained to appear at the Bar of the Court of the Acting Chief Justice failed to obtain a meeting of the Court, the Chief Justice alleging, that he was a party interested, and could not, therefore, preside. The Counsel then waited on the Officer administering the Government, who expressed himself satisfied with the papers produced, but stated he was bound by the public notice which he had given, in obedience to the instructions of the Governor-in-Chief, to the effect that only Vessels built in the *Virgin Islands* should for the future be permitted to obtain a Register in the Island of *Tortola*. On the return to *Antigua* of the Counsel for the Appellant, a promise was given by the Governor-in-Chief of the *Leeward Islands* that a properly qualified legal Gentleman should be sent down to *Tortola* to preside as Chief Justice. This promise was not fulfilled for several months, and on the 11th of November, 1869, arrangements were entered into with His Excellency the Governor-in-Chief, by

the Counsel of the Respondent, that the Ship, which had, after the departure of the Counsel from the Island of *Tortola*, been arrested on a charge of piracy, should be surrendered to the Respondent on his giving Bonds for £5,000 sterling, conditioned that the Ship should not, for the space of two years, be engaged in any illicit trade or occupation, and that no proceedings should be taken by the Respondent against any person or public Officer concerned in the detention of the Ship, or concerned in refusing to grant her a Register. On the part of the Crown it was stipulated that the Attorney-General of *St. Kitts* should prepare the Bonds and forward them to the Officer administering the Government at *Tortola*, to whom instructions were to be sent to release the Steamship, and to grant her a British Register as soon as such Bonds were duly executed by the Respondent. The Counsel for the Respondent proceeded to *St. Thomas, en route* for the Island of *Tortola;* but on arriving at the former Island he was informed that the Attorney-General of *St. Kitts* had failed to forward the Bonds to the Officer administering the Government at *Tortola*, and that the arrangement was therefore at an end. On the return of Counsel to *Antigua*, the Governor-in-Chief, through the Colonial Secretary, expressed regret that the Attorney-General of *St. Kitts* had failed to forward the Bonds to *Tortola*, and, notwithstanding the alleged strong reasons given by that Officer for not doing so, renewed the offer His Excellency had previously made; but the Counsel stated that the Respondent would readily sign the Bonds, but he was instructed to decline to receive the Register if any other condition was annexed to its acceptance, as the course pursued by the Government and its Officers had already inflicted a serious loss on the Respondent. The Ship was held by the Government of *Tortola* without any Warrant issuing from any Court of the Colony of *Tortola* until the 20th of January in the succeeding year, when a Warrant was issued from the Vice-Admiralty Court of the Island.

The affidavit which led to the Warrant of arrest was made by *Philip Williams*, one of the former Crew of the *Telegrafo*. It stated that, on the 3rd of May, 1869, he shipped on board her at *St. Marc*, a Haytian Port; that she then had a British Flag

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flying; that at *Magna* a British Schooner supplied the *Telegrafo* with Cannon, Powder, and Shot; that after visiting *St. Marc* the *Telegrafo* went to *Puerto Plata*, whence a Pilot and a number of men came on board, some of whom were detained, one being sent back with a Letter; that the next day the *Telegrafo* fired upon the Town, and again the following day; that thence, hoisting the Colombian Flag, she went to *Samana*, whence two Boats with men came off, who were detained; that the *Telegrafo* there landed armed men and fired upon the Town; a Boat with a white Flag came alongside, and the *Telegrafo* entered the Port and lay there for eight days; that during that time she took possession of a Dominican Sloop, armed her, and sent her on the coast; also took by force men from *Samana* and compelled them to work on board; that an American Schooner was made to bear to, by a Shot, and armed men were sent on board her, who afterwards returned, and the Schooner was allowed to proceed, after an interview with the Captain and General *Luperon*, who was on board the *Telegrafo* during the whole of her alleged piratical acts; that the *Telegrafo* fired upon two Dominican Schooners of War, and took possession of a Dominican Sloop laden with Wood, and also stopped, by firing at them, an English Sloop and a Spanish Schooner; that the *Telegrafo* touched at *Agna* and fired on a number of People on shore, killing one of them, and carried off a Dominican Sloop and Schooner to *Barahona*, a Port in the Island; that about eight days after, the *Telegrafo* returned with an English Schooner, to which were transferred the arms and ammunition from on board the *Telegrafo*, the latter Vessel thus disarmed going to *Tortola*.

On the 26th of January, 1870, the Respondent entered an appearance under Protest, and the following claim in the Registry of the Court of Vice-Admiralty:—

"The claim of *Augustus McCleverty*, a British subject, a native of and resident in the Island of *Tortola*, by occupation a Planter and Merchant, the sole Owner and Proprietor of the Steamship called the *Restauracion*, or *Telegrafo*, her tackle, apparel, furniture, and cargo, at the time of the seizure of the said Steamship by Order and Warrant of the Vice-Admiralty Court of this Island, in the Harbour of *Road Town, Tortola*, in the *Virgin Islands*, for the

said Steamship, her tackle, apparel, furniture, and cargo, and for all costs, charges, damages, demurrage, and expenses as have arisen, or shall or may arise, by reason of the seizure and detention of the said Steamship."

On the 3rd of February, 1870, the Respondent filed his Act on Protest and affidavit in support thereof, and prayed leave to refer to certain affidavits, exhibits, and other proofs brought into and left in the Registry of the Court of Vice-Admiralty, wherefore he prayed the Judge to admit the validity of his Protest, and to be dismissed from all further observance of justice, and to condemn the Seizor in costs. In the answer to the Act on Protest it was averred that the matters and things charged against the Ship *Telegrafo*, or *Restauracion*, were true and notorious, whereupon the Respondent in his rejoinder, *inter alia*, alleged that the acts, matters, and things charged against the Ship were not true and notorious, and in verification of what he so alleged he (the Claimant) prayed leave to refer to certain exemplifications of proceedings in conformity with the Protocol of the special Courts of *St. Thomas*, held on the 1st and 4th of February, 1870, before His Honour *P. M. Andersen*, Chief Judge of the Danish Island of *St. Thomas*, concerning the matters and things in the cause. Objection being taken by the Queen's Advocate to this passage, the Court directed it to be struck out, but allowed the passage in the answer to remain, namely, that the matters and things charged against the Ship were true and notorious, to remain.

The cause was argued on the Act on Protest, Answer, and Rejoinder, on several days; and on the 27th of April, 1870, the Judge of the Vice-Admiralty Court (The Hon. *J. R. Semper*), by his judgment, confirmed the Protest, and decided that he had no jurisdiction. The learned Judge was of opinion, that Piracy *jure gentium* could only be committed where all Nations have a common right, and no Nation an exclusive jurisdiction upon the High Seas; that when piracy was so committed it mattered not where or by whom it was done so long as it is within the general jurisdiction. That a Pirate could be, by the Law of Nations, tried and punished in any Country where he might be found; but that piracy by Municipal Statute, or any other offence against the Municipal Laws of a State, could only be tried by that State within whose territorial jurisdiction,

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or on board of whose Vessel, the offence so created was committed; citing an opinion of Sir *James Marriott*, in *Forsyth's* Cases and Opinions on Constitutional Law, p. 217; *In re Terman* (1); *Wheaton's* International Law, § 32 [Ed. 1866, by *Dana*]; *Kent's* Comms. vol. i., pp. 186, 196; *Lindo* v. *Rodney* (2); and that the alleged piratical acts, having been committed by a Foreign Ship within the Municipal and Maritime jurisdiction of *San Domingo*, were not justiciable by the Vice-Admiralty Court; citing *Wynne's* Life of Sir *Leoline Jenkins*, vol. i. p. 94; *Co.* 4th Inst. 134; Statute, 28 Hen. 8, c. 15; *Browne's* Civ. & Ad. Law, vol. ii., p. 27; *The Maria Françoise* (3); Opinion of Sir *Richard Lloyd*, *Forsyth's* Cases and Opinions on Constitutional Law, p. 111. The learned Judge was also of opinion, though it was unnecessary expressly to decide the point, that the evidence negatived the existence of any *piraticus animus*, and considered that the acts were not piratical but belligerent; and held that the question of piracy should first be tried either in the Court of the Country where the property is seized, or some other Court recognised by the Law of Nations as competent to try the question of piracy, and that not till then did the right of the Crown to the property of Pirates attach: and pronounced for the Protest, dismissing the Respondent, and decreed restitution, but without costs.

From this decision the Queen's Advocate in open Court protested an appeal to the Judicial Committee of the Privy Council, and the Court, on his application, dispensed with the customary Bond, Her Majesty being the Appellant.

The Respondent afterwards adhered to the appeal, on the ground that no costs or damages were awarded him.

The appeal now came on for hearing.

The *Attorney-General* (Sir *R. P. Collier*, Q.C.), The *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Mr. *T. D. Archibald*, for the Crown:—

Upon the facts disclosed in the affidavit to lead the Warrant of arrest, we maintain, that the Vice-Admiralty Court had jurisdiction to entertain the suit. It cannot be denied that this Ship was a piratical Vessel. The Revolutionary Government of *Hayti* could be considered as a belligerent Power. Firing on the People

(1) 33 L. J. (M.C.) (N.S.) 201. (2) 2 Doug. 613, n. (3) 6 Rob. 283.

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at *Samana*, as deposed to by *Williams*, was clearly a piratical act. The questions involved are, first, whether the Vice-Admiralty Court of the *Virgin Islands* had jurisdiction; and, secondly, whether the *Telegrafo*, or *Restauracion*, had committed acts of piracy which would justify the seizure of this Ship. The acts alleged in the affidavit of *Williams*, who was one of the late Crew on board the *Telegrafo*, or *Restauracion*, and whose affidavit led to the arrest of the Ship, were clearly piratical, and justified the proceedings in the Vice-Admiralty Court. The Vice-Admiralty Court had jurisdiction, as the Common Law and the Admiralty territorial jurisdiction are concurrent, extending to the High Water-mark on the coast, even of Foreign Countries, where the High Seas commence, and not to a distance of three miles from the shore, as has been erroneously supposed. 3 *Co.* Inst. ch. 49, as to piracy, p. 113; *Bla.* Com. by *Hargrave*, vol. i., p. 111; *Russell* on Crimes, vol. i. p. 153 [4th Ed.]; 2 *Hale*, 17; 2 *Hawk.* c. 9, s. 14. If an act of piracy has been committed within three miles of the Admiralty jurisdiction, a Vice-Admiralty Court can arrest the Ship. [SIR JAMES W. COLVILE:—That is as regards English Ships and within English Waters. How is it with regard to Foreign Vessels in Foreign Waters?] This is a Foreign Ship, and when the Ship came within the Vice-Admiralty jurisdiction of the Island of *Tortola* she became liable to seizure. The extent of the Admiralty jurisdiction in cases of piracy, whether on the High Seas or not, cannot be disputed: *Forsyth*, Cases and Opinions on Con. Law, pp. 93, 111, 217; *Phillimore* on International Law, p. 418: *Bacon's* Abr. tit. "Piracy;" Sir *John Friend's Case* (1); *The Magellan Pirates* (2); *Russell* on Crimes, p. 153 [4th Ed.]; *Lindo* v. *Rodney* (3), reported in note to *La Caux* v. *Eden* (4); *The Salvador* (5); *Wynne's* Life of Sir *Leoline Jenkins*, Vol. i., p. 94. The jurisdiction of the Vice-Admiralty Court is also recognised by American Writers: *Wheaton's* International Law, §§ 177, 180, 189; *Kent's* Comm. vol. i. p. 196. The question of the sale to the Respondent being *boná fide* is one we ask, on the part of the Crown, to be tried. We do not take issue on the mere fact of sale. The proposition on the other side will be, that a Privateer by selling in overt market can get rid of the piratical

(1) 13 State Trials, 3.
(2) 1 Spinks, Ec. & Ad. Rep. 81.
(3) 2 Doug. 613, n.
(4) Ibid. 618, a.
(5) *Ante*, p. 218.

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character of the Vessel. But, on the assumption that the Ship was a piratical Vessel, the rule which applies to goods taken by Pirates is equally applicable to a Ship, and we submit, that no sale by Market overt binds the Crown: *Com.* Dig. tit. "Market Overt," (E. 5); 2 *Co.* Inst. 713; *Browne's* Civ. and Ad. Law, Vol. ii. p. 461. A sale of a Ship by auction is a sale in Market overt; therefore, the sale of this Ship, though by auction, does not affect the rights of the Crown: *Com.* Dig. tit. "Admiralty" (E. 2.) [SIR R. PHILLIMORE:—The Crown delayed seizure for six months.] It is not a question of time, but of the right of the Crown. Substantially the question involved in this appeal is, whether the Court will permit us to establish by plea and proof the merits of the case.

Sir *R. Palmer* Q.C., and Mr. *H. R. Semper* (Attorney-General for *St. Kitts*), Mr. *Shortt*, Mr. *G. F. Blake*, and Mr. *G. D. Shee*, for the Respondent:—

The Judge of the Vice-Admiralty Court rightly came to the conclusion that the Court had no jurisdiction, and we submit, that the Crown has no jurisdiction within three miles of the shore. That was the opinion of Sir *James Marriott* in the case cited by Mr. *Forsyth* in his Cases and Opinions on Constitutional Law, p. 217. The argument on behalf of the Crown assumes that our Admiralty jurisdiction extends to the high water-mark all over the world. If that contention is right, a Foreign Ship can be seized and condemned, even after there has been a *bonâ fide* sale to an innocent Purchaser, and no proceeding either *in rem* against the Ship or against the alleged Pirates has been taken. Such a position cannot be maintained. As to the jurisdiction with respect to acts committed on the High Seas, there is no proof that the *Telegrafo*, or *Restauracion*, was a British Ship. The affidavit of *Williams* is no evidence of piracy, neither is the use of the *Haytian* Flag conclusive of the Ship's nationality; the acts deposed to are only indicative of an intention to commit warlike acts as a belligerent, and not to be treated as War. The Ship was never taken *flagrante delicto* on the High Seas, as is contemplated by the form of the affidavit to precede the Warrant of arrest of Ships and goods of Pirates (1). The Statute, 13 & 14 Vict. c. 26,

(1) Rules and Regulations of the Vice-Admiralty Courts abroad, 1842; App. 123.

relates only to bounties for destroying Pirates. There is nothing like piracy to be found in these proceedings. The certificate describes this Ship as a Merchant Ship. [The further argument was stopped, their Lordships intimating that they would consider their judgment.]

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Their Lordships' judgment was now pronounced by

SIR ROBERT PHILLIMORE:—

This is an appeal from a Sentence of the Judge of the Court of Vice-Admiralty in the *Virgin Islands*.

By that Tribunal a Warrant of arrest had been decreed, on the motion of the Advocate for the Crown, in a prosecution against a Steamship called the *Telegrafo*, or *Restauracion*, as a Pirate Vessel. Her Owner appeared, under Protest, to the jurisdiction of the Court, and, after hearing an elaborate argument from Counsel which occupied several days, the learned Judge pronounced for the Protest, and decreed restitution to the Claimant, but gave no damages or costs. From this sentence the Crown has appealed, and the Claimant has adhered to the appeal, so far as the Sentence affected the question of damages and costs.

The proceedings in the Court below were confined to what is known in the Admiralty Court as an Act on Petition, in which the Protest was set out. An Answer to that Act was given in on behalf of the Crown, and a Rejoinder on behalf of the Claimant.

The averments in these summary pleadings were supported, as is usual, by affidavits from both parties; some of those filed on behalf of the Claimant were set aside by the Court as having been, in the circumstances, improperly filed, and these have been printed in the papers laid before this Tribunal. Their Lordships have, however, been careful to confine their attention to those affidavits and documents which the Court below admitted and referred to. Even these, it must be observed, exceeded, to a certain extent, the technical limits within which, having strict regard to the character of the proceeding, namely, a Protest to the jurisdiction, they would have been kept by a Court more accustomed to exercise jurisdiction of this kind; and it has been contended at this Bar by the Law Officers for the Crown, the Appellant, that the Protest upon the question of jurisdiction, the only question for consideration in

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the Court below and here, is not sustained by the evidence, that that Protest should be overruled, and that they ought to be allowed on behalf of the Crown to establish by plea and proof in a formal manner, and according to due course of law, the merits of their case against the Steam-ship.

The Protest and the Answer, however, raise various important questions of public and international law, which appear to have been fully argued in the Court below, and are referred to in the judgment of that Court; some of which have been much insisted upon by the Appellant before this Tribunal, namely, whether the acts of the former Master and Crew of this Vessel were of a piratical or belligerent character, whether, if piratical, they were done within the territorial waters of a Foreign State, and, therefore, justiciable only by that State, or whether, being done upon the Seas, though within territorial waters, they were not, according to the Law of Nations, justiciable, as piratical, by the Tribunals of every State.

It appeared, however, to their Lordships, during the course of the argument that there were facts admitted or proved in this case, as it was conducted by both parties in the Court below, which rendered any decision upon these grave and important matters unnecessary.

The Protest among other allegations contained the following:—

"Nor had the said *Isaac Farrington*, the Seizor, in the absence of any adjudication pronouncing the said Steamship to have been engaged in acts of piracy, or to have been the property of Pirates, any authority to seize and detain the said Steamship, which had been purchased at public auction by the said *Augustus McCleverty*, nor can the said Steamship *Restauracion*, late *Telegrafo*, thus illegally seized, be brought within the jurisdiction of, or her alleged acts of piracy be recognisable by, this Honourable Court."

The Answer does not deny the facts of the sale and ownership as here stated, but alleges that the Ship being found in the Port, justified the seizure, and warranted the jurisdiction of the Court.

On the 3rd of May, 1869, the *Telegrafo* was at *St. Marc*, a Haytian port; at which time it would appear that a civil war existed, or an insurrection had broken out, in the Island of *San Domingo*. The *Telegrafo*, afterwards equipped as an armed Vessel,

did various acts of hostility, alleged on the one side to be piratical, and on the other to be belligerent, upon various parts of the coast of *San Domingo*. She was then owned and commanded by one *Domingo Accevedo*. On the 8th of June she was commissioned by the Revolutionary Government of *San Domingo*, having on board her *Gregorio Luperon*, General-in-chief of the Republican forces; on the 6th of July she landed Troops at *Barahona* on the Island, and about the 12th of July she came into the port of *Road Town*, *Tortola;* on the 21st of July she was sold by public auction for $10,025, in a formal and regular manner, by her Owner to her present possessor *McCleverty*, and she paid to the British Government certain dues upon the auction according to the law of the place; and it was not till the 19th of January, 1870, that she was arrested by a Warrant from the Court of Vice-Admiralty, as a piratical Vessel; she was at that time, and had been since the month of July, in the possession of a British Owner, not connected in any way with her previous action, whether piratical or belligerent, on the coast of *San Domingo;* not an Agent acting collusively for her former Owner, for no such suggestion is made in the affidavit which led to the warrant, or in the subsequent affidavits filed by the Court, but a *bonâ fide* Purchaser at a public sale for value. This being the state of facts, apparent on the face of the proceedings, and taken into the consideration of the Court, their Lordships were anxious to know on what authority, principle, or precedent this Vessel could be arrested as belonging to a Pirate.

No precedent has been cited to their Lordships, but it has been strongly contended that the principles of law applicable to the cases of piracy warrant the arrest. Many authorities were cited for the purpose of establishing the position that the goods of Pirates cannot be transferred by the Pirates to a third party. That goods piratically taken cannot be transferred to a third party as against their legitimate Owner is an undoubted proposition of public and of international law, but the further and different proposition, that the Ship of the Pirate which has not been taken from another person cannot be transferred to an innocent Purchaser for value, is not supported by any of the authorities cited. The goods of Pirates are forfeited to the Crown in its Office of Admiralty, but not until

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after conviction, and the Ship of the Pirate, but not until after condemnation; or, as it is correctly stated in *Bacon's* Abr., tit. "Piracy," "the goods of Pirates not taken from others, belong, after attainder, to the Crown or its Grantee: and those of which others have been despoiled will be forfeited in the same manner if the Owners come not within a reasonable time to vindicate their property."

The cases establish this position, that the Court of Admiralty has jurisdiction to entertain a suit, usually though not always instituted in a civil form, for restitution of goods piratically taken on the high Seas. The question of restitution might, in fact, be raised by two modes of civil proceeding—either by what is technically called a "cause of possession," as in the *Segredo*, otherwise *Eliza Cornish* (1), in 1853, and in a recent case, the *Mary*, otherwise *Alexandra*, in which the *United States of North America* were the Claimants; or by a cause of piracy, civil and maritime ("*causa spolii civilis et maritima.*") In the case of *The Hercules* (2), Lord *Stowell* considers the whole question of the authority of the Court of Admiralty in this matter. And it is necessary to observe, how clearly the important distinction is taken between private Owners seeking a restitution of their goods, and the Crown or Lord High Admiral proceeding *pro publicâ vindictâ*, for condemnation or conviction.

In *The Hercules* (3), an application was made to the Court on behalf of Spanish subjects, who prayed restitution of certain moneys in possession of the Court, alleged to be the proceeds of goods piratically taken. Lord *Stowell*, in the course of his judgment, observed: "The objections stated in argument are principally three: first, that there should be a preceding conviction of piracy. That this has not been generally required is sufficiently clear. It is true that where the Lord Admiral proceeds, *pro interesse suo*, upon his Royal grant of *bona piratarum, i.e.*, their own proper goods, not goods of others unlawfully taken on the seas, he must shew that the party has been attainted of piracy: *Prinston and others* v. *The Admiralty* (4); but where a person, so despoiled of his own goods, proceeds merely for restitution, no such preliminary is required. Some of the pro-

(1) 1 Spinks, Ec. & Ad. Rep. 36.
(2) 2 Dod. 369.
(3) 2 Dod. 373.
(4) 3 Bulstr. 147.

ceedings here are by articles, which of themselves are of a criminal nature, and, therefore, could not have been preceded by a conviction. Others, as in the case of *Radly and Delbow* v. *Eglesfield and Whital*, merely civil, by libel, or without reference to any antecedent conviction, nor has any such antecedent conviction been traced. In the case reported in *Bulstrode*, p. 327 (*Pelaye's Case*), likewise in the 4th Institute, p. 152, where the Spanish Ambassador proceeded for the restitution of Spanish goods taken on the high seas from Spanish subjects (and the Ambassador of that Country appears to have been a frequent party in suits of this nature), and where the adverse party, *Pelaye*, was a Jew, setting up a commission from *Morocco*, the Court said he could not be proceeded against criminally, for it was not a robbery (I presume on account of his commission), but that they might deal civilly with him for them in the Admiralty, and that he ought to answer for them there civilly. And, *per Curiam*, he may answer the suit as to the point of restitution. And it appears, as far as I can collect it, the settled law, that without a conviction the party might proceed for what is termed the point of restitution." (1)

In another part of his judgment Lord *Stowell* says (2):—"A third objection is, that the act of piracy, being a crime, could not be considered by the Common Law as the proper subject of a civil suit for restitution. And it is certainly a known principle of the Common Law that a civil suit cannot be founded on a Felony, for that would approach to what is termed a compounding of a Felony. The civil demand merges in the Felony. The Common Law rather, perhaps, considers that demand as in the nature of a debt arising upon something like a contract, and *ex maleficio non oritur contractus*. Whether this principle was imported (though with a more technical meaning) from the Civil Law (where I am not certain it is to be found in terms), or whether this mode of considering the demand as merged, is not a principle coeval and congenial with the fundamental principles of the Common Law itself, is more than I can presume to say. But I take the rule to be confined to such *maleficia* as the law technically considered as felonies, or as felonies and something more than felonies, as high treason. To misdemeanors, or other offences differently qualified,

(1) 2 Dod. 373. (2) Ibid. 375.

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the policy of the law has not applied it. Now, piracy is certainly not considered as a Felony at the Common Law. It is expressly so laid down by Lord *Hale* (*Passim*, Pleas of the Crown, Part I., 388; Part II., 18 and 370.) Pardon of all felonies reacheth not piracy. The principle, therefore, does not reach it, at least in its ordinary extent; and, looking to what has taken place in the cases of prohibition alluded to, I am led rather to infer that it could not be extended to a crime belonging to, and defined by, another system of jurisprudence, and where reasons of legal policy and convenience rather appear to oppose its introduction; for though the law may very justly and commodiously apply its own peculiar principles to its subjects in their ordinary transactions, governed immediately by its own rulers, and may, therefore, compel such individuals to give up, *pro publicâ vindictâ*, and for the protection of the community, their own private claim of indemnification for any wrong they may have suffered, it by no means follows that where the wrong done is *contra jus gentium*, and the foreign sufferer, standing upon that law, requires a reparation, the Common Law of this country would impose upon him the burthen of sacrificing his private rights, so founded, to the duty of protecting the interest of the Country of the offender, by confining the whole of his remedy to the useless privilege of a criminal prosecution. As far as I am enabled to infer from the cases of attempted prohibition, the Common Law has made no such demand, but has admitted the prosecution of a civil suit for the point of restitution, either exclusively of a criminal prosecution, or in conjunction with it."

To the same effect is the old case *Radly and Delbow* v. *Eglesfield and Whital*, reported in 1 Ventris, p. 173, and referred to by Lord *Stowell* in this judgment.

The present case, however, is clearly distinguishable from all these cases; here no private Owner is seeking restitution of his Ship, but the Crown is proceeding *pro publicâ vindictâ*, without previous condemnation or conviction, against a Vessel neither now piratically owned, nor stated to have been piratically taken from any previous Owner.

There is no authority, their Lordships think, to be derived either from principle or from precedent for the position that a Ship duly sold, before any proceedings have been taken on the part of the

Crown against her, by public auction to a *bonâ fide* and innocent Purchaser can be afterwards arrested and condemned, on account of former piratical acts, to the Crown. The consequences flowing from an opposite doctrine are very alarming. In this case, six months have elapsed between the sale and the arrest; but, upon the principle contended for, six or any number of years and any number of *bonâ fide* sales and purchases, would leave the Vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the Ship through her transfers to various Owners.

Assuming, therefore, that this Ship had been piratically navigated previous to her transfer, (a fact which their Lordships are very far from saying appears upon the affidavit which led to the warrant of arrest,) their Lordships have arrived at the conclusion, that the Court ought not to have arrested the Ship, which for many months had been in the undisputed possession of a *bonâ fide* Purchaser by public auction, on account of piratical acts alleged to have been committed from on board of her before the sale took place. Their Lordships, therefore, will humbly advise Her Majesty that the sentence of the Court below should be affirmed, so far as relates to the dismissal of this suit.

Their Lordships will direct that the Respondent have his costs of the appeal to Her Majesty in Council, but not the costs of his own adherence to the appeal, and no costs in the Court below, and no damages.

Her Majesty's Procurator-General, *F. H. Dyke*, for the Appellant.
Solicitors for the Respondent: *J. & C. Robinson.*

J. C.* 1871 *June* 15.

THE OWNERS OF THE SCREW STEAMSHIP "SAPPHO" . . . . . } APPELLANTS;

AND

DENTON AND OTHERS, LATE PART OF THE CREW OF THE STEAMSHIP "NERO" . . . . . } RESPONDENTS.

3 Ad. & E. 564, n.

4 Ad. & E. 68

THE "SAPPHO."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Salvage—Salving and salved Ships belonging to the same Owners.

Where salvage services are performed by one Ship to another, both Ships belonging to the same Owners, the Master and Crew of the Ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the Owners, and for which they would be paid for by their ordinary wages.

The Marie Jane (1) commented on.

THIS was a cause of salvage brought by the Respondents, who were part of the Crew of the Steamship *Nero*, against the Steamship *Sappho*, her cargo and freight, for salvage services to the *Sappho*, her cargo and freight. Both Ships belonged to the same Owners.

The facts of the case were shortly as follows:—

On the 15th of February, 1869, the *Sappho*, whilst on a voyage from *Cardiff* to *Constantinople* with a cargo of coals, and when about 150 miles from *Malta*, lost her screw propeller. The *Sappho*, which was rigged for sailing, was then got under sail, with a view to going into *Malta*, but in consequence of meeting with adverse heavy weather, varied by calms, she made but little progress, and on the 25th of that month, being then about 150 miles from *Malta*,

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

(1) 14 Jur. 857.

her chief Officer and four seamen proceeded in the Pinnace to *Malta* for assistance, but were never heard of again. The *Sappho* was kept under sail, and on the 2nd of March she spoke the Steamer *Ottawa*, whose services the Master of the *Sappho* declined, as he refused to render them for a less sum than £3,000. During the night of the 2nd of March, and on the following morning, the wind blew a strong gale. The *Sappho* was still kept under sail, and on the morning of the 4th of the same month the Screw Steam Ship *Nero* came up. The *Nero*, as well as the *Sappho*, belonged to the same Owners, the Appellants, but that fact was not known at the time. The Masters of the two Vessels arranged that the *Nero* should take the *Sappho* in tow to *Malta*. The *Nero* accordingly took the *Sappho* in tow, and towed her to *Malta*, where she arrived on the 8th of March, and brought her into *Valetta Harbour*.

This suit was brought by the Respondents, who were the Boatswain, Carpenter, Steward, Seamen, and Firemen of the *Nero*, for salvage against the *Sappho*, her cargo and freight. The Master, the two Mates, and the three Engineers of the *Nero* did not join in the claim for salvage.

The Judge of the Court below (The Right Hon. Sir *Robert Phillimore*), by his decree, dated the 27th of July, 1870, awarded the sum of £350 to the Respondents for salvage services to the *Sappho*, and condemned the Appellants in costs, and also pronounced the sum of £20 to be due to the Respondents for salvage services rendered to the cargo of the *Sappho*, and condemned the Owners of the cargo therein, and in the proportion of costs (1).

From this sentence the present appeal was brought.

Mr. *E. C. Clarkson*, for the Appellants:—

As the two Ships, the *Nero* and the *Sappho*, belonged to the same Owners, the Appellants, the Crew of the *Nero* were the Servants of the Appellants, and, consequently, the services they performed could give them no title to remuneration for salvage services. In *The Marie Jane* (2) the Crews of two Ships belonging to *J. L.* gave assistance to a Ship chartered to *J. L.*, and Dr. *Lushington* held, in a suit by the Crews of the two Ships against the Owners, that

(1) See case reported Law Rep. 3 A. & E. 142. (2) 14 Jur. 857.

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no salvage could be claimed. So in *The Collier* (1), Dr. *Lushington* followed the case of *The Waterloo* (2) where Lord *Stowell* says, "It is the duty of all Ships to give succour to others in distress" (3). Here the services were rendered by the Crew of one Ship to another Ship, both belonging to the same Owners, which was a sufficient reason for refusing any salvage remuneration, and none ought to have been awarded. There was no risk of life. But even if the Respondents were entitled to remuneration, the sum awarded was excessive, and should be reduced: *The Chetah* (4).

Mr. *E. G. Gibson*, for the Respondents:—

There can be no question but that salvage services of a very high order were performed by the Crew of the Ship *Nero* for the Crew of as well as the Ship *Sappho*. The fact that both the Ships belonged to the same Owners does not change the nature of the services, or exclude the claim for salvage remuneration: *The Waterloo* (5), where Lord *Stowell* held, that the *East India Company* were not exempt from payment of salvage by the Crew of a Ship in their employ for services rendered to another Ship belonging to them. That case is directly in point, and does not appear to have been cited in the case of *The Marie Jane* (6): The *Merchant Shipping Act*, 25 & 26 Vict. c. 63, s. 33. The nature of the obligation of the duties which a Mariner contracts to perform, and the circumstances which entitle him to salvage, are laid down by Lord *Stowell* in *The Neptune* (7). If a Government Steamer assists a Merchantman on a stipulation to reimburse all expenses arising from damage to the Steamer, such a stipulation is no bar to salvage compensation: *The Lustre* (8). Towage services on a contract may, from the danger in which the towed Vessel is afterwards placed and rescued by the towing tug, be superseded, and converted into salvage services: *The Minnehaha* (9).

THE LORD JUSTICE MELLISH:—

This is a suit for salvage, and it raises a question of considerable importance, namely, whether, when salvage services are performed

(1) Law Rep. 1 A. & E. 83. 12 Jur. N.S. 788
(2) 2 Dod. 433.
(3) Ibid. 437.
(4) Law Rep. 2 P. C. 205.
(5) 2 Dod. 443.
(6) 14 Jur. 857.
(7) 1 Hagg. Ad. Rep. 236–7.
(8) 3 Hagg Ad. Rep. 154.
(9) 15 Moore's P. C. Cases, 133.

by one Ship to another, and both Ships belong to the same Owners, the Crew of the Ship which has performed the salvage services is entitled to salvage remuneration?

The facts necessary to the decision of the case appear to be simple and plain. Whilst the *Sappho*, a Screw steamer, was performing a voyage in the *Mediterranean*, its screw became disabled, and the Ship itself appeared to be in a very disabled state, and in very bad weather. It was about 150 miles from *Malta*, and it appeared to be certainly in a state that made it extremely doubtful whether, if it was left to itself and got no assistance from any other Steamer, it would ever arrive at *Malta* at all. In these circumstances she fell in with another Screw steamer, the *Nero*, belonging to the same Owners, and, it apparently not being known at that time that both Vessels belonged to the same Owners, it was agreed that the *Nero* should tow the *Sappho* to *Malta*, which she accordingly did, and that arrangement was entered into on the assumption that the services were to be salvage services. It turned out that the Ships belonged to the same Owners, and of course, therefore, there could be no salvage as respects the Ships, since such a claim would be absurd; but the question arises, whether the Crew, and the Master also, of the *Nero*, if he had claimed it, would not be entitled to salvage remuneration?

It certainly seems curious that this question has never been decided on principle at all. It was very much considered in the case of *The Marie Jane* (1), which is said to be an authority, that in no case where the Ships belong to the same Owners can any salvage remuneration be recovered. But when the facts of that case are looked at, their Lordships do not think that Dr. *Lushington* intended to lay down any such general rule. There the Ships belonging to the same Owner were engaged in the African trade. It is stated in the judgment, that it was part of the general arrangement that the Ships of the same Owner and the Crews of the same Owner should render mutual assistance to each other, and the real question seems to have been whether the services there rendered did go beyond that mutual assistance which, under the circumstances of the African trade, and according to the well-known usages of that trade, one Ship was bound to render another? Dr. *Lushington*, after all, puts the case upon what appears to

(1) 14 Jur. 857.

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be the true principle, namely, whether the services rendered were services which under their contract the Seamen were bound to perform, and for which they are remunerated by their wages? It is quite clear that, as a general rule of Law, Seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, and, therefore, they never recover salvage remuneration for services connected with the saving of their own Ship, as long as the relation of Master and Servants between them and their Owner, with reference to that Ship, continues. But it has never been laid down, and their Lordships are not disposed to lay down, that if a Seaman perform services for the benefit of his Owner which are not within his contract, he cannot be entitled to salvage remuneration. Their Lordships do not say services which he is not bound to perform, because it may be that as an ordinary incident of a voyage if a Ship meets another Ship in distress, and the Master orders the Seamen of his Ship to give assistance, they are to a certain extent bound to give assistance, but then for that assistance, if salvage services are rendered, they are entitled to receive salvage remuneration. Their Lordships do not see why the case should be different if it turn out that the Ship to which the service is rendered belongs to the same Owner. The ordinary contract which a Seaman enters into certainly says nothing about rendering services to another Ship. He does something, therefore, which is not within his contract. It may be that he ought to do it because it is an ordinary incident that he should do it, but then if it is an ordinary incident that he should do it, and if he does it, not because it is within his contract, but for the reason Lord *Stowell* assigns in the case of *The Waterloo*, where he says (1), "It is the duty of all Ships to give succour to others in distress; none but a Freebooter would withhold it,"—if he performs that duty towards a Ship, though it may be belonging to the same Owner, because of that moral duty, and not because it is within his original contract of service with his Owner, there does not appear to be any good reason why the ordinary consequence should not follow, namely, that for this extraordinary service he should receive the remuneration which the law gives him. That appears to be in accordance

(1) 2 Dod. 437

with the ordinary rules laid down by Lord *Stowell,* and all the great authorities respecting salvage, that it is a right very much favoured in the law, and, therefore, that it ought not to be narrowed in a case which clearly comes within the principle. Indeed, the learned Counsel for the Appellants appeared to admit that if a Man risked his life, that being a thing he was not bound by his contract to do, he would be entitled to receive salvage remuneration; but their Lordships do not see on what principle a distinction can be drawn between a case where a Seaman risks his life and a case where he performs other extraordinary services which would in their nature be salvage services. That would be raising a new distinction, for which there appears no sufficient ground or authority. The true rule appears to their Lordships to be, to consider, whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the Seaman originally enters into, so that he receives remuneration for them by his ordinary wages? If they are not within his contract, and he does not receive remuneration for them by his ordinary wages, and they are in their nature salvage services, their Lordships are of opinion, that there is no good reason why the Seaman should not receive the ordinary salvage remuneration which the law gives him.

Then, as to the question of amount, their Lordships certainly think that the amount awarded by the Court below is somewhat large, and they will not say that if they had to determine the question, they would give the same amount; but it is a fixed rule that their Lordships do not interfere with the amount given for salvage, unless it is a case where the amount is very greatly in excess or deficient, in their estimation; and they do not think that, on the whole, there is sufficient reason to induce them to interfere with the amount in this case.

The result is, that their Lordships will recommend to Her Majesty that this appeal be dismissed with costs.

Solicitor for the Appellants: *Thomas Cooper.*
Proctor for the Respondents: *H. C. Coote.*

J. C.* 1871 June 15, 16.

JAMES YEO AND JOHN YEO . . . . . APPELLANTS;

AND

JAMES TATEM AND WILLIAM DWERRY-HOUSE BRAGINTON . . . . . } RESPONDENTS.

THE "ORIENT."

IPD. 370

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Damage—Pleadings—Practice—Appeal—Costs—Jurisdiction—Admiralty Court—Suits in personam and in rem.

In a cause of damage in the Admiralty Court, alleged to have been done by, and imputable to the acts of the Owners, and their Servants, of the Vessel proceeded against, a general denial was pleaded in answer, and a special defence that the damage complained of, was the same as had already been adjudicated upon in a Court of Law, and judgment obtained and satisfied; at the hearing in the Admiralty Court, it was proved by a Witness, who was the principal Defendant in the action at law, that the damage proceeded for was occasioned by acts done by him on his own responsibility, and in the assertion of a right claimed by him as Consignee for sale of the Vessel in question, and not as the Agent on behalf of the Owners: whereupon the Judge of the Court of Admiralty held, that the suit could not be maintained; but, inasmuch as the defence thus disclosed had not been specifically pleaded, declined to give the Defendants their costs, or to go into the special defence, though his judgment thereon was asked for by the Defendants' Counsel:—

Held, by the Judicial Committee, that in the circumstances, the appeal was not for costs alone within the meaning of the rule of the appellate Court against the allowance of appeals involving costs only; that the general traverse and denial of the averments in the Petition, was sufficient to justify the evidence produced; and that the Defendants were further entitled to have the judgment of the Court, as asked on the special defence pleaded, that if prejudiced by such judgment, they might appeal.

Semble: Where there has been a mistake upon some matter of law that governs or affects the costs of the suit, the party prejudiced has a right to have the benefit of its correction by appeal.

Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other.

THIS appeal was brought from a sentence of the High Court of Admiralty in a cause of damage instituted on behalf of the Respon-

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

dents, the Owners of the Brigantine *Georgiana*, against the Brig *Orient* and her Owners, the Appellants, being, as was assumed, their Agents.

In the petition filed on behalf of the Respondents it was alleged, that whilst the *Georgiana* was lying at *Appledore*, in the Port of *Bideford*, where she had been beached for the purpose of being repaired, the Owners of the *Orient*, or their Servants, moored the latter Vessel close alongside the *Georgiana*, passing chains and hawsers from the bow and stern of the *Orient* to the shore, and hauling them taut; the effect of which was, that as the tide rose the *Orient* was jammed against the *Georgiana*, and did her considerable damage. The petition then alleged, that the damage was imputable solely to the acts of the Owners of the *Orient* and their Servants. The Appellants, in their answer to the petition, denied the statements therein made, and pleaded that the cause of action and damage in the petition mentioned were respectively the same cause of action and the same damage in respect of which the Respondents had brought an action in the Court of Common Pleas, and had obtained judgment therein, by which judgment the cause of action became and was merged, and which judgment was satisfied before the institution of the suit. In reply, the Respondents stated, that the action was brought for trespass and wrongful detention of the *Georgiana*, whereas the Admiralty suit was instituted for the recovery of damage done to the *Georgiana* by the *Orient;* and further, that the action was not a suit *in rem*, and was of a different nature to, and not between the same parties as, the present suit. By the rejoinder, the Appellants, after denying the truth of the allegations in the reply, submitted further that the same were irrelevant.

The cause came on for hearing on the 7th of July, 1869, in the Court below, and after evidence had been put in and given on behalf of the Appellants and Respondents, the Appellants called one *Yeo* as a Witness, who proved, among other things, that the *Orient* had been placed by the Appellants in his charge for the purpose of being completed, and afterwards sold by him, and that she was before and at the time when the alleged damage was done in his possession and custody. On this evidence the Judge of the Court below (The Right Hon. Sir *Robert Phillimore*)

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ruled that the Respondents had no cause of action, inasmuch as the Ship was not in the possession or custody of the Servants of the Appellants, but as this defence was not raised by the pleadings, and on the Counsel for the Appellants declining to amend the pleadings, the learned Judge called upon the Counsel for the Respondents to state what course he proposed to take under the circumstances; and on his stating that he could not carry his case further, the Counsel for the Appellants requested the Judge to hear and determine the other issues raised upon the record; but he declined to do so, on the ground, that he was bound to take notice of the evidence which supported the defence—that the alleged damage was not occasioned by the Owners of the *Orient* or their Servants, although such defence was not specifically pleaded, and that he was bound, therefore, to dismiss the suit, and had no jurisdiction to hear or determine the other issues; the learned Judge accordingly by his judgment dismissed the suit, directing each party to pay their own costs.

The appeal was from this sentence.

Mr. *Butt*, Q.C., Mr. *A. Cohen*, and Mr. *Bullen*, for the Appellants:—

This is not an appeal for costs only within the ruling of this Tribunal in the cases of *Attenborough* v. *Kemp* (1) and *Richards* v. *Birley* (2). The point at issue is one of pleading, and we maintain, that the judgment of the Court below on that question ought to be set aside, and judgment with costs entered upon the whole record for the Appellants. First, because the general traverse contained in the Appellants' answer sufficiently raised the defence that the damage, proved from the evidence, was not imputable to the Owners of the *Orient*, or their Servants, as alleged in the petition: but, secondly, because if the pleadings did not sufficiently raise such defence, on the Counsel for the Appellants declining to amend, the Appellants were entitled to have the judgment of the Court on the other issues raised on the Record; as it was to be inferred from the evidence, and was admitted by the Respondents' Counsel, that the facts alleged by the Appellants in their answer, of the cause of action and damage being the same as had been already adjudicated

(1) 14 Moore's P. C. Cases, 351. (2) 2 Moore's P. C. Cases (N.S.) 96.

upon by a Court of Law, were true, the judgment recovered at law was a valid answer to the Respondents' claim in the Court of Admiralty. The cause, as described in the Preliminary Act, was one of damage by collision; and though the Plaintiff in a cause of damage is not bound to plead the particular acts or character of the negligence which caused the damage, *The Freedom* (1), or the facts to be given in evidence of the collision, *The East Lothian* (2), *The Haswell* (3), yet if the alleged damage or collision are traversed, the especial acts which occasioned the damage or collision must be expressly proved; and the Appellants here were entitled to have had such proofs produced and decided on. The damages stated in the petition were not laid as done by the Master and crew, but by one of the Owners in charge; it was not, necessary, therefore, to plead specifically in reply that the party in possession was not the Owner or the Servant of the Owner, it lay upon the Plaintiffs, the Respondents, to shew that the party charged was the party legally liable for the damage.

The Admiralty-Advocate (Dr. *Deane*, Q.C.), and Mr. *Cottingham*, for the Respondents:—

First, this is not a question of pleading, but simply an appeal for costs, which will not be entertained by this Court: *Attenborough* v. *Kemp* (4); *Richards* v. *Birley* (5); *Wilson* v. *Reg.* (6). The question of costs is one entirely in the discretion of the Judge of the Court below, and this Tribunal will not interfere with its exercise. Were appeals for costs permitted, there would be no limit to them. In cases, too, where nominal damages only have been given by a jury and approved by the Court, this Tribunal will not interfere: *The Bank of Van Diemen's Land* v. *The Bank of Victoria* (7).

Secondly, as regards the rules of pleading in the Admiralty Court. There is no general issue in the pleadings in that Court: the form and manner of pleading are provided by the Rules, Orders, and Regulations of the High Court of Admiralty, made in pursuance of the Acts, 3 & 4 Vict. c. 65 and c. 66, and the

(1) Law Rep. 2 A. & E. 346.
(2) 14 Moore's P. C. Cases, 173.
(3) 1 B. & L. 247.
(4) 14 Moore's P. C. Cases, 351.
(5) 2 Moore's P. C. Cases (N.S.) 96.
(6) 4 Moore's P. C. Cases (N.S.) 307.
(7) *Ante*, p. 526.

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17 & 18 Vict. c. 78 (1). By sect. 65 of these Rules (2) the modes of pleading hitherto used, as well in causes by Act on Petition, as by Plea, and by Plea and proof, are abolished. Section 66 provides that there shall be but one mode of pleading in the Court. The first pleading to be called the Petition; the second, the answer; the third, the reply; and the fourth the Rejoinder; and the subsequent pleadings, if any, are to be called as they have heretofore been called in causes by Act on petition; and the 67th section says, that every pleading is to be divided into short paragraphs, numbered consecutively, which shall be called the Articles of the pleadings, and shall contain brief statements of the facts material to the issue. If, therefore, a matter is intended to be specially relied on as a defence, it must be specifically pleaded, that was the view the learned Judge of the Admiralty Court took, and we contend he was right.

SIR JOSEPH NAPIER:—

This petition has been filed in the Court of Admiralty by the Owners of the Brigantine *Georgiana* against the Owners of the *Orient*, for damage to the *Georgiana*, alleged to have been done by, and imputable solely to, the acts of the Owners of the *Orient* and their Servants. The answer to the petition sets forth, first, a general denial of the statements in the petition; and, secondly, a special defence "that the cause of action in the petition mentioned, and also the damage sought to be recovered for in this cause by the Plaintiffs, are respectively the same cause of action and the same damage in respect of which the Plaintiffs commenced an action in Her Majesty's Court of Common Pleas; and afterwards, and before the institution of this suit, obtained judgment therein, in which said judgment the said cause of action became and was merged, and which said judgment was satisfied before the commencement of this suit." It is admitted in the reply that such action was brought by the Plaintiffs, and judgment recovered, but it is alleged, that it was for trespass and for wrongful detention of their Ship, whereas the present suit is instituted for the recovery of compensation for damage inflicted by the *Georgiana* upon the *Orient*. It is further relied on that this is a proceeding *in rem*, of a different nature, and not between the same parties.

(1) See Lush. Ad. Rep. Appx. p. vii. (2) Ibid. p. xiv.

Upon this state of the pleadings the case came before the Judge of the Admiralty Court. On behalf of the Defendants, a Witness (Mr. *Yeo*) was examined who was the principal Defendant in the action that was tried in the Court of Common Pleas. Upon his evidence it appeared that the damage that was occasioned by the one Ship to the other was the result of what was done under his orders, in the assertion of what he claimed to be his right. This damage was part of the cause of action in the proceedings in the Court of Common Pleas, which were for trespass and damage, and also for wrongful detention of the Ship of the Plaintiffs. It was the same damage in substance as is described in the evidence on behalf of the Plaintiffs in this present suit before the Judge of the Admiralty Court. Upon the evidence of Mr. *Yeo* it appeared that he was the consignee of the *Orient* for sale, and that in doing the acts that caused the damage he was acting on his own responsibility, in the assertion of a right claimed by himself, and not as servant, or on behalf of the Owners. The Counsel for the Plaintiffs admitted that after this evidence he could not go on with the case. The learned Judge decided that the proceeding in the Admiralty Court could not be maintained, and that the Petition must be dismissed. But he held that, as this defence had not been specially set forth in the pleadings, he was bound to dismiss the Petition without giving costs to the Defendants. He also held that, in consequence of his being bound to act upon the evidence of Mr. *Yeo*, he was not bound to take into consideration the second part of the defence, although it was distinctly and properly pleaded, and his judgment upon it was required by the Counsel for the Defendants. The result was, that he dismissed the Petition without giving to the Defendant any costs of his defence, under the general or special issue.

Now, the first duty with regard to the reception of evidence upon which a Court has to act in a suit, is to see that the fact which the evidence is offered to prove or disprove, has been sufficiently put in issue by the pleadings. Here there is a comprehensive denial of each and all of the material allegations in the Petition. It was a just defence on the part of the Owners of the *Orient*, who are sought to be made responsible in this proceeding, although not resident in *England*. They in effect say to the Plaintiffs, "We require you to establish and prove the essential allega-

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tions in your petition, one of which is that the damage of which you complain was done by us, or by some one for whose acts we are responsible. If we are (as you allege) legally responsible, you have been legally satisfied by a proceeding at law in an action in which you had the opportunity of making the best case you could as to your claim for this damage." It appears on the admissions of the Plaintiffs that, before this proceeding was commenced, the sum for which judgment was recovered in the action at law had been paid. If the security for damages adjudged and not paid was insufficient, or if the Owners of the Ship were responsible but insolvent, the Plaintiff would have had a cumulative remedy by proceeding *in rem* in the Court of Admiralty; but it could only be to realize one compensation for the same cause of action. Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other. Here the Plaintiffs proceeded against the party who was the primary trespasser, and properly responsible. The amount of compensation for the damage which the law had reduced to certainty in the action had been paid; and having been by the law so reduced to certainty, and the amount having been paid before the commencement of this proceeding, there was an end of the matter both in law and justice.

A question is made as to what the effect of the general traverse is as to costs of the defence admissible under it when proved; whether the Judge was bound to decide the other issue raised by the special defence, which became material only so far as related to the costs on that issue; and whether the judgment, as involving costs only, was subject to an appeal. Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal. At Common Law, where there are several issues raised by the pleadings, it may be that some are found to be quite immaterial, and the Judge at the trial has the power of discharging the jury from finding a verdict on such; but as to those that involve a substantial question of costs, the party interested has a right to have the proper findings entered on the record, in

order to secure the costs to which he is lawfully entitled on such issues: *The King* v. *Johnson* (1).

The Plaintiffs are here proceeding against parties who are resident in a foreign country, and they seek to make their claim available against the Vessel of the Defendants, who have a right to call upon the Plaintiffs to prove the allegations in their petition. It seems to their Lordships to be the effect of the general traverse and denial, that it puts in issue the material allegations in the petition of the Plaintiffs, and requires them to prove their case as alleged. According to the general rule of law, as stated by Serjeant *Williams* (2), whatever facts a Plaintiff or Prosecutor is bound to prove on the general issue pleaded, the Defendant may contravert the truth of, by opposite evidence. Here a material allegation is, that the damage to the Ship of the Plaintiffs was done by the Owners of the *Orient* or their servants, and therefore it was open to the Defendants, under the general traverse, to controvert the truth of this allegation, which the Plaintiffs were, on the other hand, called on to sustain.

The law of the Court of Admiralty is laid down in the case of *The East Lothian* (3), followed and further explained by the judgment delivered by Lord *Kingsdown* in the case of *The Minnehaha* (4). In the case of the *East Lothian*, where the Defendant in answer to the petition stated a particular defence, in addition to the denial of the Plaintiff's case, it was held that he was not bound to prove his special defence as pleaded; but that he was at liberty to avail himself of the failure of the Plaintiff to make out the case alleged in the petition. The distinction is taken and explained between the case on the part of the Plaintiff and that on the part of the Defendant. The Plaintiff is bound to state distinctly what his gravamen is, and the Defendant has a right to call on him to prove it as it has been stated. If the Plaintiff fail in this, the Defendant may say—that is in itself a good defence for me, albeit that I am unable to prove the special defence which I have put forward.

In the judgment delivered by Lord *Chelmsford*, after having pointed out that the Defendant might have contented himself

(1) 6 Cl. & Fin. 60.
(2) 2 Saund. 158 *a*, n. 3.
(3) 14 Moore's P. C. Cases, 173.
(4) 15 Moore's P. C. Cases, 133.

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with a denial of the Plaintiff's allegation, his Lordship says, "An erroneous allegation of the mode in which the injury occurred, made by way of answer to a libel, does not narrow the issue down to the particular fact alleged, so as to entitle the complaining party to recover, if the proof of it should fail. He must rely upon the establishment of his own case, and not upon the failure of his adversary's, and must succeed upon the truth of his own allegation, or not at all" (1). It is said that in a suit in the Court of Admiralty, if the defence be not distinctly pleaded, the Plaintiff might be taken by surprise. Now there was no difficulty as to this in the present suit. It was open to the Plaintiffs, if they had grounds sufficient, to have applied to the Court to alter or amend or set aside the general traverse as embarrassing. By the 77th rule of 1859, every pleading shall stand admitted, if within four days from the filing the adverse Proctor does not file a notice of motion objecting to the admissibility thereof. No such notice was filed, and no application was made by the Plaintiffs, and therefore it must be taken that they consented to go to trial on the pleadings as they stood. It does not appear that in fact there was any ground of surprise. On the contrary, the learned Judge in his judgment points out that he was himself obliged to take judicial cognizance from the report of the proceedings in the action at law (which was put in evidence) that the Plaintiffs could not have been ignorant that Mr. *Yeo* was only an Agent of the Owners of the *Orient* for the purposes of sale. There was no case, then, for the exercise of equitable interference, because there was no danger of doing any injustice to the Plaintiffs by adhering to the general rule of law as to the sufficiency of the general traverse to put in issue every material allegation of the Plaintiffs. In the judgment in *The Minnehaha*, where the question was whether negligence could be relied on as a defence where it had not been specially pleaded, Lord *Kingsdown* says: "It is then contended by the Appellants that as to negligence or error in judgment there is no case brought forward by the answer, and that the Court is precluded from inquiry into that matter. We are not prepared to go that length. The claimants must prove their own case, they must shew that the Ship being in danger from no fault of theirs, they performed ser-

(1) 14 Moore's P. C. Cases, 183.

vices which were not covered by their towage contract, and did all they could to prevent the danger" (1). He afterwards says: "Though we think that the Appellants must make out their own case, and that the objections to which we have referred are open to the Respondents, still in judging of the effects of the evidence we must have regard to the degree of notice which was given by the Respondents to the Appellants of the nature of the objections on which it was intended to rely. Certainly the defence here is so framed that although it puts in issue all the facts alleged by the Appellants, it does not give them notice of any particular point to which their evidence should be especially directed" (2). The general traverse was taken to be legally sufficient to put in issue the allegations that were material to the Plaintiff's case, but subject to such equitable treatment as would give no undue advantage to the Defendant from not having put forward his defence specially. Here the essential defect in their case was known to the Plaintiffs before the suit was commenced; the defence as pleaded required them to prove their case; they made no application to the Court to amend or set aside the general traverse, or for leave to discontinue the suit; but when the evidence of Mr. *Yeo* was given, they admitted that their proceeding against the Defendants could not be maintained. The Court, certainly, was not bound to interfere in order to assist a proceeding which was admitted to be unfounded; and this must be taken to have been known to the Plaintiffs and their advisers before this suit was commenced. It was an abuse and perversion of the procedure of the Court of Admiralty for the unjust and illegal purpose of trying to augment the compensation, which had been legally assessed and paid to the Plaintiffs, in respect moreover of acts done, for which these Defendants were not responsible in any Court. As to the general traverse, it was legally sufficient to put the Plaintiffs upon strict proof of their case, and to admit the Defendants to controvert any of the material allegations in the Petition. If these were put in issue in a form that was embarrassing, the remedy was by a motion to the Court. If the form was inadmissible and insufficient, the evidence of Mr. *Yeo* as to his limited agency ought to have been objected to on the part of the Plaintiffs; the learned Judge ought to have been called on

(1) 15 Moore's P. C. Cases, 158. (2) Ibid, p. 160.

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not to receive it; or when it was found what the effect of it was, he should have been requested to strike it out of his notes as inadmissible. A Judge is not at liberty to act upon evidence that he does not hold to be admissible on some one of the issues raised by the pleadings. Indeed, the learned Judge of the Court of Admiralty said that he "must not reject the evidence, but must apply it to the general averments and denial." How could this be allowed unless these averments and denial were legally sufficient? He was not required by the Plaintiffs to exercise an equitable control, or to make any order alleged to be material to the assertion of the Plaintiffs' rights. The leading counsel for the Plaintiffs not having objected to the admissibility of the evidence of Mr. *Yeo*, and having admitted that it could not be controverted, upon that issue and upon the very right of the case there was an end of the Plaintiffs' suit, which ought never to have been commenced. But, although there was so far an end of the case, it did not follow that the other defence that was raised was not also to be decided as required on behalf of the Defendants as material to them, at least in respect of costs.

Their Lordships, therefore, are of opinion, that the defence admitted under the general traverse, and established by Mr. *Yeo's* evidence, should have been followed by the legal result as to costs; and as to the other defence, that it ought also to have been decided in favour of the Defendants, with a like result as to costs. It is only necessary to look into the pleadings and proceedings in the action, and at the way in which the learned Lord Chief Justice of the Common Pleas left the case to the Jury, to see that, in point of law, the claim for damage to the Plaintiffs' Ship was substantially comprehended, and compensation was adjudged in that action. This has been paid, and the present suit should not have been instituted. Their Lordships, therefore, will humbly recommend Her Majesty that this appeal be allowed, and that the judgment that has been pronounced by the learned Judge of the Admiralty be varied, by directing that the suit be dismissed with costs: the Appellants to have their costs of this appeal.

Proctors for the Appellants: *Fielder & Sumner.*
Solicitor for the Respondents: *Peckham.*

JOHN GAVIN . . . . . APPELLANT; J.C.*

AND 1871

JAMES FARQUHAR HADDEN . . . . . RESPONDENT. *July* 5, 6, 7, 8, 10.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Executor's power to mortgage or alienate Testator's real estate.

15 Eq 137

Bond and mortgage made in pursuance of an Order of Court by one Executor of his Testator's real estate in *Ceylon*, for the necessary expenses for the cultivation of the estate, and a Fiscal sale in execution of a decree in consequence of the default in payment by such Mortgagor, upheld; notwithstanding an attempt to repudiate the mortgage and set aside the sale by a co-Executor and Devisee in trust under the Will of the Testator on an allegation of collusion with the Purchaser, and that such co-Executor was not a party to the mortgage.

The Supreme Court at *Ceylon* being a Court of Law and Equity, it is in accordance with the practice of that Court, that for moneys *bonâ fide* advanced to an Executor or Administrator for the purposes of the estate which he represents, a suit may be sustained against him in his representative character, and judgment and execution had against the Testator's or Intestate's estate; if, however, the Executor or Administrator deals with such estate in breach of his duty, a person who is party to such dealings, or takes any property of the Testator with knowledge of a breach of trust, will not be allowed to retain any benefit therefrom.

An Executor by the law in force in *Ceylon* has the same powers as an English Executor, with the addition that it extends to immoveable as well as moveable property.

THIS suit was in the nature of an action of ejectment to recover possession, with mense profits, of a Coffee plantation, and land called *Dodangalle Kelle*, in the District of *Kandy*, in the Island of *Ceylon*, the lands being part of the estate of *Martin Lindsay* deceased; and to set aside an instrument containing a Bond, and a declaration of hypothecation or Mortgage, dated the 8th of July, 1848, executed by *David Baird Lindsay*, one of the Executors and Devisees in trust under the Will of *Martin Lindsay*, in substitution of a previous Bond given by him; both Bonds having been made in favour of *William Clerihew*, the latter in pursuance of

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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an Order of the District Court of *Kandy*, empowering *David Baird Lindsay* to mortgage the real estate of the Testator for special purposes therein mentioned; and, further, to set aside the sale of the *Dodangalle Kelle* estate, effected at the instance of the Appellant by the local Fiscal, in execution of a Decree of the District Court of *Kandy*, in a suit for enforcing the second Bond, brought by *William Clerihew* against *David Baird Lindsay* as sole Defendant therein.

The principal questions raised in the Courts below were, first, whether *David Baird Lindsay* alone had sufficient legal power and authority to mortgage the real estate of *Martin Lindsay* the Testator; secondly, whether, if so, the execution and granting of the second Bond was a valid exercise by *David Baird Lindsay* of such power and authority, by virtue either of the Order of the District Court, or of a Power of Attorney executed by his co-trustees; thirdly, whether the proceedings and the judgment of the District Court of *Kandy* in the suit for enforcing the second Bond were regular or binding on the Respondent and his co-trustees in *Scotland;* fourthly, whether the seizure and sale of the *Dodangalle Kelle* estate by the Fiscal in execution of the judgment were regular and valid, and binding on the Respondent and his co-trustees, against the estate of the Testator, *Martin Lindsay*, or invalid by reason of the alleged collusion and fraud of the Appellant and *Clerihew* in relation to such sale; and, fifthly, whether the Appellant was in *bonâ fide* possession of the *Dodangalle Kelle* estate, or a wrongdoer, as asserted by the Respondent; and, lastly, whether the Appellant had full notice of the right and title of the Respondent and his co-trustees in *Scotland* to the *Dodangalle Kelle* lands, prior to the sale and his purchase thereof, of their determination to assert such right and title by suit, and to contest the validity of the title of the Appellant as Purchaser under the judgment and sale, previous to his commencing the cultivation of such estate.

The facts of the case were as follows:—

The above-named Colonel *Martin Lindsay* was a native of *Scotland*, and domiciled there at the time of his death at *Kandy* in the year 1847.

By his Will, dated the 21st of December, 1844, after certain

bequests to his Wife, he devised his share in an estate called *Rajawellee*, and also his three undivided fourth parts of the *Dodangallee Kelle* estate, to the remaining one-fourth part of which he declared in his Will that his Son, *David Baird Lindsay*, was entitled, and also all other property, whether real, personal, or mixed, belonging to him in the Island of *Ceylon*, unto and to the use of his Wife, *Elsy Lindsay* (since deceased), *David Baird Lindsay*, *Henry Lindsay*, *James Hadden* (also since deceased), and the Respondent, their heirs, Executors, and Administrators, upon trust to manage and cultivate the same in such manner as they, his Trustees, should think most for the benefit of the persons who should be entitled thereto under his Will; and as he therein stated, he believed, that the shares, plantations, and premises would become more valuable from year to year, he declared it to be his most earnest desire that his Trustees might continue to manage the same as long as might be practicable without bringing the same to a sale, but, nevertheless, that such declaration should not have the effect of preventing the sale of the same if his Trustees should think proper; and the Testator also declared, that his Trustees should stand seized and possessed of the premises and the clear gains to be derived therefrom upon certain trusts for the benefit of his Wife and Children; and he provided that any one or more of his Sons who might feel disposed to take the management of the estate and premises, and for that purpose to reside in *Ceylon*, should be at liberty to do so if his Trustees should consider the same to be advantageous, but not otherwise; and he declared that the Son or Sons so for the time being acting in the management of the estate and premises should be considered as the Agent or Agents, and be subject to the control and direction of his Trustees in the management thereof or otherwise relating thereto; and he empowered his Trustees, if and when they thought fit, to sell the shares, plantations, and premises; and he gave all the residue of his real and personal estate (except real or heritable property in *Scotland*) to the same Trustees upon trust for sale and conversion, and to stand possessed of the proceeds thereof upon certain trusts for the benefit of his Wife and children; and he appointed *Elsy Lindsay*, *David Baird Lindsay*, *Henry Lindsay*, *James Hadden*, and *James Farquhar Hadden*, the Respondent, Executors of his Will, and he devised all

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hereditaments vested in him as Trustee for an estate of freehold unto the same Trustees, their heirs and assigns, upon the trusts affecting the hereditaments respectively.

On the death of the Testator, his Son, *David Baird Lindsay*, with the concurrence of *Elsy Lindsay*, *James Hadden*, and the Respondent, continued to manage and cultivate the Testator's estates in *Ceylon*.

Elsy Lindsay, *James Hadden*, and the Respondent, proved the Will of the Testator in *Scotland*, in April, 1847, and *David Baird Lindsay*, on exhibiting an exemplification of the Will, proved it in *Ceylon*, in June in the same year; *Henry Lindsay* did not prove or accept the trusts of the Will.

In April, 1847, *David Baird Lindsay*, then resident in *Ceylon*, borrowed from the Defendant, *William Clerihew*, £1,000, for the purpose of carrying on the cultivation of the Testator's estates, and to secure the repayment thereof executed and delivered his personal Bond, dated the 28th of April, 1847, whereby he acknowledged himself to be indebted to *Clerihew* in the principal sum of £1,000, and declared that he mortgaged to his Obligee certain hereditaments belonging to himself, and certain other hereditaments belonging to one *Thomas Hunter*, as security for the payment of the sum borrowed with interest, and he covenanted either to grant unto *Clerihew*, within nine calendar months from the 5th of April then instant, or at any earlier period, if practicable, another Bond in the place of that Bond for the above sum of £1,000 and the interest thereof, mortgaging as security for the same, in lieu of the therein aforesaid lands and premises, so much of a certain other Coffee plantation called the *Rajawellee* estate as belonged to the heirs of the Testator, and also the tract of land called *Dodangalle Kelle*, but conditioned upon *David Baird Lindsay's* "securing due and legal powers and authorities from the heirs of *Martin Lindsay* so to mortgage both the aforesaid lands and plantations," or to lodge the sum of £1,000 in the name of *Clerihew*, in manner therein mentioned.

On the 28th of February, 1848, *Richard James Smith*, as Proctor on behalf of *David Baird Lindsay*, and at the instance of the *Oriental Bank*, applied to a Judge of the District Court of *Kandy* for authority to mortgage the landed property of the Testator in

Ceylon, with the view to discharge the claims on the estate, and to meet the necessary expenses attending the upkeep and cultivation of the Plantation belonging thereto, and praying for the authority of the Court to mortgage so much of the landed property of the deceased as should be sufficient to raise £12,000 to be applied for the purposes aforesaid.

By an Order of the Judge dated the same day, it was ordered that *David Baird Lindsay*, as such Executor, be empowered to mortgage so much of the landed property in *Ceylon* of the Testator as should be sufficient to raise a sum of £12,000, to be appropriated towards the payment of the debts of the Testator, and the management and cultivation of the plantation belonging to his estate.

On the 8th of July, 1848, *David Baird Lindsay* executed and delivered to the Defendant, *Clerihew*, another Bond in substitution for the first, whereby he declared himself to be indebted to the latter in £1,000, being the same sum as above already mentioned. This second Bond being granted without any new consideration, under the condition or stipulation contained in the former Bond.

On the 12th of March, 1853, *Clerihew* filed his libel in the District Court of *Kandy* in suit No. 26,485, against *David Baird Lindsay*, as Executor of the estate of *Martin Lindsay*, to recover the principal and interest then due on the Bond of the 8th of July, 1848.

On the 27th of April, 1853, a writ of sequestration was issued out of the Court against the property of *David Baird Lindsay* personally until he should appear in the suit, and by virtue of which writ the *Dodangalle Kelle* estate was seized and sequestered. On the 20th of May, 1853, *Clerihew*, the Plaintiff in that suit, applied for and obtained an Order that proclamation should be made on the 25th and 30th of the same month, which was made accordingly.

After an *ex parte* trial, in the absence of *David Baird Lindsay*, a decree was obtained on the 13th of June, 1853, in the suit, to the effect, that *David Baird Lindsay*, as Executor of the estate of *Martin Lindsay*, should pay to *Clerihew* the sum of £1,000, with interest at 12 per cent. from the 5th of July, 1848, until payment and costs of suit.

Execution was issued on the 16th of June, 1853, under the

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decree against the houses, lands, goods, debts, and credits, of the Testator, *Martin Lindsay*.

On the 24th of June, 1853, a Notice was published of an intended "Fiscal's sale," on the 18th of July, 1853, at the spot of the *Dodangalle Kelle* Estate, described therein as "belonging to the Defendant" in the suit.

Clerihew, the Plaintiff, left *Ceylon* for *Scotland* during the progress of the last-mentioned proceedings, viz., at the end of March, 1853, and *David Baird Lindsay*, the Defendant in that suit, was absent during the whole of those proceedings. It was alleged by the Respondent that before *Clerihew* left *Ceylon* a secret arrangement had been made by him with the Appellant by which, among other things, it was agreed that the Appellant should become the Purchaser of the *Dodangalle Kelle* estate at a nominal price.

The estate was submitted to sale by the Fiscal pursuant to notice, on the 18th of July, 1853, and the Appellant, who attended the sale in person, became the Purchaser for the sum of £100. Two days later the estate was conveyed by the Fiscal to the Appellant, and in the deed of conveyance it was stated that the writ of execution directed the levy to be made of the "Houses, lands, goods, debts, and credits of *David Baird Lindsay*, Executor of the estate of *Martin Lindsay*," the fact being, as it was alleged, that the direction contained in the writ was for the levy to be made of the houses, lands, goods, debts, and credits of *Martin Lindsay*. The sale, it was also alleged, was made without any notice to, or communication with, the Respondent or his co-trustees.

Previously to the above sale both the Appellant and *Clerihew* were aware that a suit was then pending between the Respondent and the *Oriental Bank Corporation*, for the purpose of setting aside the sale of the *Rajawellee* estate, which formed part of the Testator's estate, and which had been seized in execution and sold to the *Oriental Bank* in that suit, previously brought on a similar Bond and declaration of mortgage purporting to be executed by *David Baird Lindsay*, and in pursuance of an Order of the District *Kandy* Court of the 28th of February, 1848.

It was alleged by the Respondent, that by the secret agreement above referred to the Appellant was to take over the estate and pay to *Clerihew* £1,616, which was the amount then due on the

Bond of the 8th of July, 1848, for principal and interest, and to pay subsequent interest at 10 per cent., and that it was part of the same agreement that *Clerihew* should make advances by way of loan to the Appellant at the same rate of interest, in order to enable him to plant out and cultivate the estate.

It appeared that this arrangement was reduced into writing on the 19th of March, 1853, in a Letter, of that date, but it was alleged, that the terms were never communicated to *David Baird Lindsay*, or to the Respondent, although the amount of the writ of execution was thereby substantially satisfied prior to the sale.

The Appellant paid to the Fiscal the £100 bid at the sale, and the Fiscal put him in possession of the lands. The Appellant, however, credited *Clerihew* with £1,616 for the purchase of the estate, with interest on the principal secured by the Bond to the time of the sale. The judgment on record in the action on the Bond was allowed to remain unsatisfied for all but £100, and the writ of execution remained in force.

After the above sale, and before the Appellant commenced laying the lands out and planting them as a Coffee estate, *Clerihew* instructed his Brother, *Francis Clerihew*, residing in *Aberdeen*, to call on the Respondent, and endeavour to obtain from him and his co-trustees such a deed as would cure the defect of title in the purchased estate. *Francis Clerihew* accordingly had an interview with the Respondent, when he informed him that his Brother had sold the estate, and that he wished to make the title good, which he could not do without the Respondent's signature and Mrs. *Lindsay's*, the only remaining Executors at that time in *England*. The Respondent refused to accede to this proposal, stating that he and his co-trustees were carrying on the suit to recover the *Rajawellee* estate, and were not likely to do anything to invalidate that claim; and further, that if they were successful in that suit, they would then proceed for the *Dodangalle* estate. The delay was alleged to be necessary, because, by the seizure of the *Rajawellee* estate, which was the principal property of the Testator, the Executors were left without funds, and so were unable to take steps to recover the *Dodangalle Kelle* estate, which the Respondent then, for the first time, learnt had been sold.

Notwithstanding such notice to the Appellant and *Clerihew* of

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the intention of the Trustees to dispute the validity of the sale, and to take legal proceedings to recover the estate, the Appellant proceeded to cut down the Forest, and to open and plant the estate with coffee plants, by means of moneys lent to him by the Defendant *Clerihew*, after such notice.

The first decree of the District Court of *Kandy* in the *Rajawellee* suit was made on the 16th of April, 1855, in favour of the Plaintiffs (the Respondent and *Hadden*), as such Trustees as aforesaid, but that decree was appealed from to the Supreme Court of *Ceylon*, and that Court, by its decree, reversed the decree of the Lower Court, and dismissed the suit with costs. The Respondent and his co-trustee appealed against the decree of the Supreme Court to Her Majesty in Council, and on the 23rd of June, 1860, the Judicial Committee by their judgment reversed the decree, and restored the decree of the Lower Court with certain modifications as to mesne profits (1).

On the 23rd of January, 1863, the Respondent, as surviving Trustee, commenced the suit out of which the present appeal arose, by filing his libel in the District Court of *Kandy* against the Appellant and *Clerihew* and *David Baird Lindsay*, stating the principal facts before related, and praying a declaration and decree that the Bond of the 8th of July, 1848, was null and void so far as regarded the Respondent and the trust estate of the Testator, and further that, by no proceedings in the suit of *Clerihew* v. *Lindsay* could the rights of the Respondent, as such Trustee, and the estate of the Testator, be in any way legally affected; and that by no proceedings had in the suit and under the decree therein in respect to the execution against the estate of the Testator, and the sale thereupon of the *Dodangalle Kelle* estate, did the same or any part thereof legally pass to or become the property of the Appellant; and praying that the decree and execution obtained in the suit, and also the sale (charged to have been brought about collusively and fraudulently as before stated) might be set aside, and that the Respondent might be put into possession of the estate on behalf of himself as such Trustee, and those whose interests he represented; and also that the Appellant, and *Clerihew*, and *David Baird Lindsay*, might be decreed to pay to the Respondent, as

(1) See the case reported 13 Moore's P. C. Cases, p. 401.

such Devisee in trust, and as for mesne profits, the sum of £20,000, with interest and costs of suit, and for further relief.

The Appellant, by his amended answer, alleged that *David Baird Lindsay* and *Elsy Lindsay* alone accepted or acted in the execution of the trusts of the Will, as regarded the Testator's landed property in *Ceylon*, and that *Elsy Lindsay* did not act in the execution of or accept such trusts until after the period at which the £1,000 was lent to *David Baird Lindsay* by *Clerihew*, as therein stated; and also alleged that *David Baird Lindsay*, being the only one of the persons named as Trustees and Executors who resided in *Ceylon*, immediately upon the death of the Testator accepted and acted in the execution of the trusts thereof, and thenceforward continued solely to manage and administer the property and estate of the Testator in *Ceylon*, and to execute the trusts of his Will in relation thereto, with the privity and knowledge of the other Executors and Trustees, not only without objection from any of them, but with their actual concurrence and express desire; and it was alleged that the estate of the Testator at his death was heavily indebted to the *Oriental Bank Company* and to Messrs. *Hudson, Chandler, & Co.*, Agents in *Ceylon*, in respect of advances for the cultivation and upkeep of the *Rajawellee* Coffee plantation, which formed part of his estate, and which by his Will he desired should be retained in specie if possible; and that *David Baird Lindsay*, in or shortly prior to April, 1847, accepted the trusts of the Will, and undertook the management and direction of the estate, and being the only one of the Trustees and Executors who had done so, and money being required for paying the expenses of the cultivation and upkeep of the *Rajawellee* plantation, or other the purposes of the Testator's estate, borrowed from *Clerihew* £1,000 for the purpose of providing funds for meeting such expenses, and as a security for the payment thereof to him with interest, executed to him the Bond of the 28th of April, 1847, aforesaid, which the Appellant insisted created a valid obligation upon the estate of the Testator, and also upon *David Baird Lindsay* personally and individually; and he alleged that the £1,000 so borrowed was paid to *Hunter*, the Manager of *Hudson, Chandler, & Co.'s* business, for the purposes of the *Rajawellee* estate, and was carried by the Firm to the

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credit of the estate, and that the other Trustees and Executors were made acquainted with the fact of £1,000 having been so borrowed and applied, and that they never made any objection thereto. The Defendant also, by his answer, relied upon the Order of the Judge of the District Court of *Kandy* of the 28th of February, 1848, and insisted that if at the time at which the same was obtained, there were any persons in *England* who had accepted the office of Trustees of the Testator's Will, as regarded his estate in *Ceylon* or otherwise, the Order was obtained with their knowledge and sanction, and without any concealment or untruth whatsoever; and that if they did not know of the Order having been obtained at the time at which it was obtained, they became acquainted therewith at a subsequent period, and before the Appellant purchased the *Dodangalle Kelle* lands, and either approved thereof, or made no objection thereto. The Appellant denied that the Bond of the 8th of July, 1848, was granted for securing a personal debt of *David Baird Lindsay*, and insisted that the same was granted in substitution of the previous Bond of the 28th of April, 1847, and he denied that the debt in respect of which the suit of "*Clerihew* v. *Lindsay*" was instituted was therein treated as the private debt of *David Baird Lindsay*, and alleged that it was treated as the debt of the Testator's estate, and also of *David Baird Lindsay* personally. The answer admitted that *David Baird Lindsay* was absent from the Island at the time of the institution of the suit, but alleged and insisted that nevertheless all the proceedings therein were strictly regular. The Appellant also insisted that proceedings to set aside the decree ought to have been taken within four years from the date thereof, and relied upon the alleged laches of the Respondent in instituting such proceedings, and denied that the *Dodangalle Kelle* lands was worth £2,000 at the time of sale as in the libel stated. The answer also insisted, that the Appellant purchased the land for himself at the Fiscal's sale, solely, and not on behalf of himself and *Clerihew*, and that there was no arrangement or agreement between them that *Clerihew* should have any share therein. The answer further denied that the institution of the suit, or the fact of the sale, was concealed from *David Baird Lindsay*, but alleged that on the contrary he was fully aware thereof; and the Appellant insisted,

that he was a Purchaser for valuable consideration without knowledge or notice of any of the facts relied on by the Respondent as grounds for setting aside the sale, and that since the sale he, the Appellant, had converted the land into a Coffee plantation, and he admitted that he had received the profits of the crops gathered therefrom, and he insisted that the Respondent ought not to be allowed to sue without previously tendering to him the sum expended by him on the estate. The answer also denied the right of the Respondent to mesne profits.

The Defendant, *Clerihew*, by his answer, denied that he had received any part of the amount due on two Bills of Exchange hereinafter mentioned. His answer was in other respects substantially the same as that of the Appellant.

David Baird Lindsay, by his answer, in substance admitted the allegations of the libel. The answer insisted, that the proceedings in the Defendant *Clerihew's* suit were irregular, upon the following (amongst other) grounds:—(1) That the Defendant *Clerihew*, was not entitled to issue his mandate of sequestration without a return from all the Districts in the Island that *David Baird Lindsay* was not to be found in any one of them, whereas the return actually obtained was, that he was not to be found in the district of *Kandy*. (2) That the proclamations after the sequestration calling upon *David Baird Lindsay* to appear, on pain of the Court proceeding *ex parte*, were made at such intervals as precluded the possibility of his being communicated with on the subject of the proceedings. (3) That the Defendant *Clerihew* and his Proctor were aware at the institution of the suit, that *David Baird Lindsay* was then absent from the island. (4) That although, as alleged by the above Appellant and Defendant *Clerihew*, the Appellant had made good to Defendant *Clerihew* the amount due to him upon his judgment, satisfaction thereof was not entered up; but the whole of the judgment, less only £100, was allowed to stand on record. (5) That, by the Appellant's and the Defendant *Clerihew's* own shewing, the whole of Defendant *Clerihew's* debt had been satisfied, the Defendant *Clerihew* having subsequently thereto recovered on two Bills of Exchange for £500 each, which represented the principal amount secured by the Bond of the 8th of July, 1848, from the estate of *Elsy Lindsay*, which had been sequestered in

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Scotland, dividends amounting to £300. (6) That after the receipt of the £300 the Defendant *Clerihew* made a demand on *David Baird Lindsay* for £600 on the Bond. (7) That the above Appellant and the Defendant *Clerihew*, colluding together for the purpose of defrauding the Testator's Estate, entered into a secret arrangement with a view to purchase the same for a nominal sum, and prevented *bonâ fide* bidders for competing for the same. (8) That the Bond of the 8th of July, 1848, did not create a valid charge upon the Testator's estate, and that the whole of the proceedings under which the judgment and execution were obtained, and the subsequent proceedings under which the property was sold by the Fiscal, were utterly bad; and (9) That the consideration for the Bond of the 8th of July, 1848, was the previously existing debt of *David Baird Lindsay*.

At the hearing *Richard James Smith*, a Proctor, was produced as a Witness for the Appellant: he stated that he had seen a power of attorney which had been given to one *Charles Stanton Hadden* and *David Baird Lindsay* by the co-trustees of the latter, which he stated, to the best of his recollection, was both joint and several.

On the 7th of February, 1865, the District Judge (Mr. *T. Lewis Gibson*) delivered judgment in the suit, by which, after a full review and analysis of the evidence, he determined that the Defendant, *David Baird Lindsay*, as Executor of Colonel *Martin Lindsay*, had power to mortgage the assets of the Testator, and that, therefore, the mortgage Bond of the 8th of July, 1848, was a valid mortgage independently of the Order of Court of the 28th of February, 1848; and dismissed the Respondents' libel, with costs of the Appellant and *Clerihew*.

The Respondent appealed to the Supreme Court of the Island of *Ceylon*, and on the 30th of November, 1865, the appeal came on to be heard before that Court, when the Chief Justice, Sir *Edward Shepherd Creasy*, being of opinion, that there should be an opportunity for further inquiry and consideration as to the nature of the power of Attorney held by *David Baird Lindsay*, the judgment of the District Court was set aside for that purpose, the Supreme Court giving no opinion on the case, but ordering that the case should be sent back for further hearing and consideration, and for judgment *de novo*, both parties being at liberty

to adduce fresh evidence as to the nature of the power of Attorney, but not as to any other matter.

The suit came on to be heard again on the additional evidence, taken under a commission, before the same Judge of the District Court of *Kandy*, on the 28th of March, 1866, and on the 23rd of April, 1866, the Judge delivered the following judgment, dismissing the Respondent's libel, and ordering him to pay the costs of the Appellant and *Clerihew*:—"The Supreme Court, by its Order of the 30th of November last, has sent this case back for further inquiry and consideration as to the real nature of the power of Attorney held by the third Defendant, and for this Court to give judgment *de novo*. The Court has carefully read over the additional evidence adduced by the Plaintiff, and also examined the Books referred to, particularly a draft of the power of Attorney produced, upon which the Plaintiff now rests his case, and which has been put in to contradict the evidence of Mr. *Smith* as to the power of Attorney spoken to by him. The Court holds that there is not sufficient evidence before it to identify the draft power produced with the power of Attorney spoken of by Mr. *Smith*, and upon which he seems to have acted. The Court is also of opinion that sufficient search has not been made for the original power of Attorney. The Court sees no reason, therefore, to alter its opinion with reference to the power of Attorney, and adheres to its former judgment, and for the reasons therein given. It is decreed that Plaintiff's claim be dismissed, and that he do pay the costs of the first and second Defendants,—the third Defendant paying his own costs."

The Respondent appealed to the Supreme Court of *Ceylon*.

The appeal came on to be heard before the Supreme Court, and by a decree of that Court, dated the 17th of July, 1867, the decree of the District Court was ordered to be set aside, and judgment to be entered for the Respondent. The Court declared, on the evidence, and against the finding of the Lower Court, that the power of Attorney given by the Testator's Trustees in *Scotland* was a joint power, and not a joint and several power; that a false allegation was made to the District Court of *Kandy*, to the effect that *Lindsay* had full power from his co-executors to mortgage; that if he had really possessed such power from his

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co-executors, no order of that Court was necessary for the purpose; that there were irregularities in the conduct of the suit of "*Clerihew* v. *Lindsay*," and (after finding and declaring that both *Clerihew* and the Appellant had notice of the defect of title previous to the sale and purchase of the estate in question, and that there was collusion between them, and no acquiescence or laches on the part of the Plaintiff, the Respondent, so as to bar him from recovering the estate) the Court declared, that the Bond of the 8th of July, 1848, was null and void so far as regarded the Respondent and the trust estate of the Testator, and that the proceedings in the District Court of *Kandy*, in the suit of "*Clerihew* v. *Lindsay*" were invalid to affect the estate of the Testator; that the Fiscal's sale of the *Dodangalle Kelle* estate was similarly invalid, and that the Conveyance thereof to the Appellant was invalid, null, and void; and it was ordered that the Respondent (the Plaintiff) as Devisee in trust of the Will of Colonel *Martin Lindsay*, be put in possession of the *Dodangalle Kelle* estate and premises; and it was adjudged that the Defendants (the Appellant and *Clerihew*), jointly and severally should pay to the Respondent (the Plaintiff) by way of damages and for mesne profits, a sum equal to the net profits of the estate since the same had been opened and cultivated to the time of the Respondent's being placed in possession, such net profits to be calculated after allowing for useful expenses; and adjudged the Defendants, the Appellant and *Clerihew*, jointly and severally to pay the Respondent his costs of the action and of the appeal, excepting those costs which the Respondent was ordered to pay by the judgment of the Supreme Court of the 30th of November, 1865, and *David Baird Lindsay* was ordered to pay his own costs. The judgment, after dealing with the question of the power of Attorney to *David Baird Lindsay*, and with the question of notice, of the want of authority on the part of *David Baird Lindsay*, and of the doubtful title in respect of the estate purchased by the Appellant, and other incidental questions, concluded thus:—"We are all clearly of opinion, that *David Baird Lindsay* mortgaged this *Dodangalle Kelle* estate without lawful authority to do so. That the mortgage, and the District Court proceedings founded on it, the sale to Mr. *Gavin* (the Appellant), and the Conveyance are all invalid; and we find specifically that *Clerihew* knew *David*

Baird Lindsay's want of authority at the time of the mortgage, and that *Gavin* had notice of it at the time of his purchase; that there was collusion between *D. B. Lindsay* and *Clerihew*; and that there was collusion between *Clerihew* and *Gavin*. We also find that there has been no acquiescence or laches on the part of the Plaintiff (the Appellant), so as to bar him from now recovering. There is a difficulty in this case arising from the Plaintiff claiming as devisee in the early part of the libel in respect of three-fourths only of the estate. The facts appear to be that Colonel *Lindsay* intended *David Baird Lindsay* to have one-fourth of this estate, and there is a memorandum in *David Baird Lindsay's* favour, but there was not, so far as we can see, any deed or instrument in his favour which could pass landed property in *Ceylon*. But the Defendants have certainly no right to hold this one-fourth as under *David Baird Lindsay*. The judgment of the District Court was a judgment against *David Baird Lindsay* as Executor, and not personally, and the estate was seized and sold as part of the Testator's, Colonel *Lindsay's*, property, and not as the property in any degree of *David Baird Lindsay*. Colonel *Lindsay's* Will, besides the specific devises in the commencement, has at the end a general devise to the same Devisees, under which this one-fourth would pass; and the prayer for relief is explicit and full enough to authorize us in decreeing to Plaintiff possession of all the estate without prejudice to any claim to this one-fourth which *David Baird Lindsay* may be able to substantiate. With regard to mesne profits, we think that the Plaintiff is entitled to them on a calculation of net profits to the time when possession is given up, after allowing for all useful expenses, but disallowing the four hereinafter mentioned sums which have been claimed on the part of the Defendants:—first, £1,616 for purchase-money, except so far as regards £100, which Plaintiff has stated his willingness to allow, and which for that reason only we allow. Second, the charge of £150 a year and interest thereon, charged by Mr. *Gavin* on behalf of himself and firm. Third, the charge of 12 per cent. on the whole; and, lastly, the charge for commission at $2\frac{1}{2}$ per cent. We understand that the parties have agreed to a calculation of figures, if not the figures must be referred to the Registrar to calculate, with power to call in two merchants as joint referees."

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In pursuance of the provisions of the Charter of *Ceylon*, the judgment of the 17th of July, 1867, was brought before the Supreme Court, sitting as a Court of Review, on the petition of *Clerihew*, and the following judgment of that Court, dated the 22nd of November, 1867, affirmed the same:—"The judgment which was given in this case on the 17th of July last having been brought before us sitting as a Court of Review (as required by the 52nd section of the Royal Charter of the 18th of February, 1833), the learned Counsel for the first Defendant and Appellant, *Gavin*, addressed no argument whatever to us to shew why our former judgment should be reversed or modified, beyond referring us to the first Defendant's and Appellant's petition of appeal. We have read and considered that petition, and we see nothing in it that alters the opinions expressed by us in our former judgment. That petition contains a complaint that we give no reasons for finding that there has been no such acquiescence or laches on the part of the Plaintiff, the Respondent, as to bar his right of recovering in this suit. It may be proper for us now to state that there is clear proof of the *Lindsay* family having, by the institution of the *Rajawellee* suit, taken prompt steps to dispute the right of *David Baird Lindsay* to incumber or alienate the family property in *Ceylon*, and when the *Rajawellee* suit was decided in their favour they took prompt steps to recover the *Dodangalle* property; also, the *Lindsays*, while kept out of their inheritance, were reduced to great poverty and distress, and it seems unreasonable to consider them blamable, for not having burdened themselves with two very expensive actions at the same time. The Defendants had ample notice, that the *Lindsay* family did not acquiesce in their proceedings as to this *Dodangalle* property. This is proved by the refusal of the family to confirm the conveyance from *Clerihew* to *Gavin*, and by numerous other circumstances in the case. The learned Counsel for the second Defendant, *Clerihew*, and the Appellant urged that there was no proof of his Client having shared with the Appellant in any of the profits of the estate. Without discussing the details of the dealings of the first and second Defendants with each other, it seems to us sufficient to observe that there is, in our opinion, clear proof of the second Defendant having taken part in the commission of wrong towards the Plaintiff (the Respondent), and that

he is responsible to the Plaintiff for the damages which have been naturally and directly caused to the Plaintiff by that wrong. We affirm the decision already given on the 17th of July last, and, sitting as a Court of Review, we give the same judgment as that given on this case by the Supreme Court on the day last mentioned."

The appeal was from this decree.

Mr. *Fooks*, Q.C., Mr. *Fry*, Q.C., and Mr. *C. T. Simpson*, for the Appellant:—

This suit is one of equitable ejectment, upon which, we insist, the Supreme Court came to an erroneous conclusion, both on facts as well as law, upon the evidence before it. We submit, that the judgment is not only based upon facts not sustained or warranted by the evidence in the suit, but upon facts and circumstances which were not put in issue by the pleadings, and which were immaterial to the issues raised in the pleadings as between the Respondent and the Appellant, and ought not, therefore, to have been admitted in evidence, or allowed to influence the decision of the Court. In the first place, the decree of the Supreme Court proceeds upon an assumption of collusion and complicity between the Defendant, *David Baird Lindsay*, and *Clerihew* in procuring by a false allegation, of which there is not the slightest proof, the Order of the District Court of *Kandy* of the 28th of February, 1848, which gave authority to *D. B. Lindsay* to mortgage the Testator's estate; and that the Appellant, *Gavin*, at the time of the purchase at the Fiscal's sale, had notice of such alleged collusion and complicity; and that the Order for sale was, therefore, obtained on a false allegation. In the second place, the decree proceeds on an assumption, not again in issue in the pleadings, or supported by any evidence, that the £1,000 which was borrowed of the Defendant *Clerihew* by *D. B. Lindsay*, was borrowed and expended by him for his own purposes, and not for the benefit of the Testator's estate, and that the Appellant was cognisant of that fact also at the time of the sale; so that any title he acquired thereby would be defective and questionable. We submit that, according to English law, it is clear, as a general rule, that one of several Executors in a Testator's Will, both before as well as after probate,

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has power to borrow money on security of the Testator's estate, to be administered by the Executors for the purpose of defraying the Testator's debts, or for properly administering his assets: *Williams* on Executors, Pt. III. B. I., ch. I., p. 872; *Ib.* ch. II., p. 885 [6th Ed.] The position, therefore, laid down by the Supreme Court that *D. B. Lindsay* had no power to charge the Testator's estate before he became Executor, in the sense that he was not Executor until he had actually taken probate, is untenable in law. He had ample power to charge generally, where the object was the upkeep and cultivation of his Testator's estate: *Farhall* v. *Farhall* (1); *Haynes* v. *Forshaw* (2); *McLeod* v. *Drummond* (3); *Ex parte Garland* (4); *Ex parte Richardson* (5); *Labouchere* v. *Tupper* (6); *Keene* v. *Robarts* (7); *Stroughill* v. *Anstey* (8). The case here is entirely different from the *Rajawellee* case, *Lindsay* v. *The Oriental Bank* at *Colombo* (9), with which it has been confused and misunderstood in the Court below. The mortgage Bond there sought to be set aside was executed by the Testator himself. By the Roman-Dutch Law an Executor may deal with the realty as well as the personalty of his Testator, and that is the law in *Ceylon*: Ordinance No. 6 of 1854: Inst. of the Laws of *Ceylon*, by *Thomson*, pref. p. viii. The Roman-Dutch law, Equity, and large portions of English Common Law are blended: Inst. of the Laws of *Ceylon*, by *Thomson*, pref. p. vi.; and the Supreme Court exercises a co-ordinate jurisdiction in Law and Equity. Even if the Order for sale were irregular, it would not be set aside by the Appeal Court if no substantial injustice has been done. The Order for sale was never impeached or questioned for years, and cannot, as we submit, be questioned now upon a proceeding such as this: *Bowen* v. *Evans* (10); *Lloyd* v. *Johnes* (11); *Curtis* v. *Price* (12); *Lord* v. *Swift* (13); *Bennett* v. *Hamill* (14). They referred also to *Jarman* on Wills, vol. ii. p. 560; *Williams* on Executors, Pt. I., B. IV., ch. I., sect. 2, p. 291 [6th Ed.]

The power of an Executor by the laws in *Ceylon*, to charge

(1) Law Rep. 7 Eq. 286.
(2) 11 Hare, 93, 101.
(3) 14 Ves. 353; 17 Ves. 154.
(4) 10 Ves. 121.
(5) 3 Madd. 157.
(6) 11 Moore's P. C. Cases, 198.
(7) 4 Madd. 357.
(8) 1 De G. M. & G. 635.
(9) 13 Moore's P. C. Cases, 401.
(10) 1 Jo. & Lat. p. 178.
(11) 9 Ves. 37.
(12) 12 Ves. 89.
(13) 2 B. & B. 529.
(14) 2 Sch. & Lef. 566.

or alienate the estate of his Testator is abundantly proved by the cases produced as precedents, as well from the District Courts as from the Supreme Court of *Ceylon*, printed with these proceedings: *Pulle* v. *Moekœtan*, No. 4,416, 24th October, 1838; *Don Mathes* v. *Don Gabriel*, No. 986, 5th July, 1847; *Perera* v. *Swaris*, No. 2,496, 5th May, 1848; *Chetty* v. *Dona Christina*, No. 19,124, 12th May, 1846; *Appoo* v. *Pandakkaredere*, No. 26,361, 17th June, 1856; *Banda* v. *Banda*, No. 26,992, 14th May, 1862; the only thing that can vitiate such alienations is fraud or collusion; and such power extends to immoveable as well as moveable property. It may be that an Executor ought not to sell landed estate without the sanction of the Court; but in this case that sanction was obtained, the sale being made under the Fiscal's Order.

Sir *R. Palmer*, Q.C., Mr. *Leith*, and Mr. *Woodroffe*, for the Respondent:—

The first question regards the validity of the two Bonds granted by *David Baird Lindsay*, as Executor of *Martin Lindsay*, to *Clerihew*, the Defendant in the suit below. The one covenanting, and the other purporting, to mortgage, or hypothecate, the lands and plantations of the Testator, *Martin Lindsay*, before probate, and without the consent or concurrence of the Respondent and his other co-Executors. The first Bond was a mere personal obligation. The covenant to grant a second Bond that should charge the estates of the Testator was dependent on the fact of the Obligor, *D. B. Lindsay*, being an Executor, and obtaining the consent of the other Executors. This, we say, he never did effectually, and, therefore, that for the purpose of charging the estate of *Martin Lindsay* the second Bond was ineffectual and void, and could not be binding on the Respondent, or his Testator's estate: *Ex parte Garland* (1); *Hankey* v. *Hammond* (2); *Ex parte Richardson* (3).

The power given by the District Court of *Kandy* to *D. B. Lindsay* to mortgage the Testator's estate to the extent of £12,000 to pay off debts alleged to be due by the Testator, was not well or legally created; there was no proof before the Court of the

(1) 10 Ves. 121. (2) 3 Madd. 148, n. (3) 3 Madd. 138.

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truth of such allegation, which is proved in the present suit not to be true. The Fiscal's sale under that Order was, therefore, illegal and void. The sale of the *Dodangalle* estate and possession thereof by the Appellant was fraudulent and collusive, as well against *D. B. Lindsay* as the Respondent. The principles on which Executors may deal with the personal estate of a Testator in this Country are defined and stated in *McLeod* v. *Drummond* (1). The same principles have been applied and acted on by this Tribunal in *Labouchere* v. *Tupper* (2): *Keene* v. *Robarts* (3); *Williams* on Executors, Pt. III. B. I., ch. I., pp. 874, 875 [6th Ed.] It is an afterthought to say that a sole Executor had, *ipso facto*, power to deal with the property independently of the power of Attorney or Order of the District Court of *Kandy*. The precedents referred to by the Appellant of the decisions of the Courts in the Colony, do not shew that the Courts in all respects follow the English Law, which only is resorted to in cases of probate and Executors, the Courts considering immoveable property as chattels real in *England*.

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The consideration of the judgment was reserved. Judgment was now delivered by

SIR JOSEPH NAPIER, BART.:—

This suit was brought by one Executor and Trustee to recover for the estate property sold under an execution in a suit against his co-executor and Trustee.

It is not the province of a fresh suit to shew irregularity or error of fact or of law in another suit, otherwise there would be no end of litigation, and the humblest Court in the kingdom might be called on to set aside the decision of the highest.

Irregularity, error of fact or of law, must be shewn in the suit itself, must be rectified by application to the original Court, or by way of appeal from or review of the judgment. In this case the fresh suit is not by the original Defendant, but by a co-Executor and co-Devisee. That makes no difference. It would cause most incalculable mischief if it were once supposed, that an action and judgment against an Executor, or other legal Representative,

(1) 14 Ves. 353; S. C. on appeal, 17 Ves. 154.

(2) 11 Moore's P. C. Cases, 198.

(3) 4 Madd. 357.

as such, is not as binding against the Testator's estate as any action or judgment against any Defendant is binding against him.

The only ground on which it is competent for any other Executor, or any other person interested in the estate, to question in a new suit the proceedings in a former action which has resulted in a judgment against the property of the testator, is fraud.

Fraud will suffice to open anything.

If a creditor of a person who happens to be Executor, by colluding with such Executor, dishonestly obtains judgment and execution against the assets, when his claim was only against the Executor personally, such a transaction can be unravelled.

Was there any such fraud or collusion in this case?

The action itself was certainly anything but collusive. It is quite clear that the Defendant to it deliberately allowed the proceedings to go on, not by way of collusion with the Plaintiff, but with the settled intention to avail himself of what he conceived to be a defect in the Plaintiff's title.

It is, however, said, that the record itself shews that the Plaintiff was not entitled to sue the Defendant in his representative capacity, and that he was suing on an instrument which merely gave him a personal right against the Defendant.

That would be so, no doubt, if the action had been brought in an English Court of Common Law. On a bond given by an Executor after the Testator's death, even for moneys due from the Testator, or moneys advanced for the purposes of the estate, the judgment on the Bond must have been against the Executor personally, and not a judgment against him, as Executor, to be satisfied *de bonis testatoris.*

If that objection to the proceedings were well founded, it would really not advance the Plaintiff's case, for it would not shew a ground for a new suit, but only shew that a judgment had been obtained on insufficient allegations and evidence, which would be merely ground for proceedings in error or appeal in the original suit. Their Lordships, however, are not satisfied that the objection is well founded with reference to proceedings in *Ceylon.* In *England* on such an instrument as that sued on, the Creditor would have obtained judgment in a Court of Law against the Executor personally, and would have obtained a decree in a Court of Equity

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against the assets of the Testator. But the Court in *Ceylon* is a Court both of Law and Equity, and from several precedents with which they have been furnished it appears to their Lordships to be in accordance with the practice in *Ceylon* that for moneys *bonâ fide* advanced to an Executor or Administrator for the purposes of the estate, a suit may be sustained against him in his representative character, and to have judgment and execution against the Testator's estate. A proceeding which, to say the least of it, is quite as consistent with natural equity, and quite as convenient a mode for the administration of justice, as that which is open to a creditor under the complicated and technical procedure which exists in *England*.

Their Lordships must, therefore, deal with the case as it was in fact dealt with in the Court in *Ceylon*, which tried what appears to their Lordships to be the real question in the cause. Was there anything fraudulent in the concoction of the instrument which was the foundation of the suit? If the Creditor had knowingly obtained from the Executor an instrument which the Executor ought not to have given him—if that instrument giving a right of action against the estate were tainted with fraud, that taint would vitiate all the proceedings, however formal and regular, as against all participators in such fraud, and all persons fixed with knowledge of the fraud and claiming benefits under it; and it is therefore necessary to inquire whether there was such fraud in the inception of the claim.

On this question their Lordships have had the benefit of a learned argument, illustrated by many authorities, for the purpose of establishing this proposition, which their Lordships are disposed to accept as an elementary principle of English and of all law, viz., that great as are the powers of a legal representative over assets, if he deals with those assets in breach of his duty, a person who is a party to such dealing, or takes with knowledge of the breach of trust, will not be allowed to retain any benefit therefrom.

But what were the facts of this case?

Mr. *Martin Lindsay* died in *Ceylon* possessed of a Coffee plantation in full work, and of the piece of forest land the subject of this suit, which he had taken with a view to its conversion into another Coffee plantation.

He left in the Island his eldest Son, who had been engaged

actively in the management of the plantation, and who had reason to believe that he was Executor, but beyond that knew nothing of the Will, which was in *Scotland.*

There were no available funds. The mercantile agents in the Colony had advanced as much as they could, and all the works on the plantation must have stopped if funds were not forthcoming.

In this emergency the Son, *David Baird Lindsay*, raises £1,000 from Mr. *Clerihew*, and gives the best security he can.

The mercantile Agents were themselves so pressed for money that in order to raise it they pledged securities of their own. But it was part of the arrangement that, within nine months at farthest, *David Baird Lindsay* would substitute for that security a security on the Testator's estate, obtaining proper authority for the purpose. The money was paid to the Agents with an agreement or understanding, binding in good faith and honesty, and probably in law, that they would then continue to make the advances requisite for the cultivation and upkeep of the plantation.

David Baird Lindsay (whose suit this is as much as it is the suit of the Plaintiff, *Hadden*) was examined as a Witness for the Plaintiff, and was cross-examined. The Court below rejected his testimony as that of a Witness not trustworthy. Their Lordships are unable to concur in that view. Evidence extracted by cross-examination from an unwilling witness is generally the evidence which it is most safe to rely on. From that evidence it appears that every farthing of the money was actually drawn out and expended on the estate—in fact, in its salvage; for what would have become of it if all the Labourers had been discharged and everything suspended? Probably what would happen to a colliery in *England* if everything was suddenly stopped. There is no proof—which it was for the Plaintiffs to supply—that there was any private debt or any private purpose of *David Baird Lindsay* for which the money was borrowed. Their Lordships are satisfied that the money was honestly borrowed and honestly applied for the benefit of the estate.

When the Will came out to the Colony, it appeared that *David Baird Lindsay* was one of the Executors, and, being the only one in the Island, he took out Probate. It is stated in the judgment in *Ceylon* (and the form of the Probate, and all the

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proceedings in this case, and in the other cases with which they have been furnished, shew their Lordships that it is correctly stated) that an Executor in *Ceylon* has the same power as an English Executor, with this addition, that it extends over all real estate, just as in *England* it extends over chattels personal.

He, the Executor, armed with this power, gave the instrument in question in substitution for his former security.

It appears to their Lordships that it would be a perversion of justice to hold that a man, supposing himself to be Executor, and borrowing money, and using money for the estate, pledging his own security and his friends' property for it in the first instance, with such a stipulation as was made in this case; then, finding that he really was Executor, clothing himself with proper probate, and giving a security on the Testator's estate in substitution for the provisional security, was guilty of any wrong, and to hold that the transaction is to be treated as a fraud or as a breach of trust in which he and the Creditor were participators. Their Lordships are satisfied that it was an honest Bond and charge, honestly given and honestly accepted; and that whatever legal rights it conferred, remain unaffected by any equitable consideration.

It is, however, suggested, or apparently suggested, in the judgment of the Court of *Ceylon*, that the power of the Testator to deal with the property had been affected by the assent of the Executors to the specific devise to themselves as devisees in trust. This assent is inferred from the fact that there were communications between the Executors themselves, and that the English Executors had sent out a power of Attorney to *Ceylon*. No such assent is, however, proved, or even pleaded.

It is not lightly to be presumed that a sole acting Executor in one country would, while the debts were unpaid, assent to a bequest to devisees in a distant Country, so as to deprive himself of his power honestly to deal with the assets for the payment of the debts. It would be a grave wrong in him to do so. And it would be most mischievous to hold that a purchaser or creditor dealing with or suing the sole legal personal Representative in the country could be affected by private communications between the Executors which are supposed to have changed their title from that of Executors to that of specific Devisees.

Their Lordships are of opinion that the Bond and security was an honest Bond and security, and did effectually pledge the property of the Testator; that the action was an honest action; and that even if there were, which they do not think there is, any error of law or of fact in the judgment, the judgment legally warranted the writ of execution—the writ of execution legally authorized the sale by the Fiscal, and the sale by the Fiscal effectually transferred the property to the Purchaser. It is in that respect the exact converse of the *Rajawellee* case formerly decided by this Committee.

Their Lordships do not think that the title of the Appellant at all depends on the power of Attorney, on which so much evidence was given, or on the Order of the Court authorizing the Executor to mortgage; but they think it right to observe that the gravest mischiefs would ensue if such an order could be questioned on the ground of some mistake made in granting it, or some impropriety in the application for it.

Evidence has been gone into to shew that there was grave misconduct in respect of what took place at the sale by the Fiscal. No such case is, however, made in the plaint, nor could it well be.

It is obvious that a judgment Debtor coming to complain of a sale by the sheriff, and get back his property, must come promptly. If he does not so come, and come prepared to redeem the property by paying the judgment debt, the utmost relief he could ever be entitled to would be to have the real value of the property taken *pro tanto* in satisfaction of the judgment.

But their Lordships do not think it right to pass that part of the case by unnoticed. It is quite obvious that the £100 purchase-money was a nominal price as compared with the real value of the property. But what was done in this case appears to be a common practice in the Island. When property is taken in execution, and it is reasonably certain that it will not realize sufficient to satisfy the execution, it is understood that the creditor will take it. No one thinks it worth while to attend the sale, and the property is knocked down to the Agent of the execution creditor for some small sum.

In this case the execution Creditor sent his agent to the sale to

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buy for him, having previously arranged to sell to the agent for the full amount of the execution debt; and there is evidence that persons were dissuaded from attending, and that one person attending was bought off. The Creditor, it should be stated, agreed to give credit for the purchase-money, and to lend all the money necessary for bringing the land into cultivation.

It is not for their Lordships to suggest what the mode or extent of relief would be in such a case, but they are satisfied that in a proper proceeding by and against the proper parties some means of giving adequate relief would be found. As they have said, however, the case is not before them in this suit; and with one exception, about to be pointed out, no wrong has been done. The property, in its then state, however sold, was clearly not worth more than the amount of the debt.

What would it have realised at a Fiscal's sale, even if the judgment Creditor had done his utmost to obtain the highest price, when the judgment Debtor had done all he could to render it valueless by letting it be known that the Purchaser was purchasing a lawsuit?

The Testator's assets have gone in satisfying a debt more than their value; and if the property had been openly taken in satisfaction of the judgment, there would have been no ground of substantial complaint. But the Defendant *Clerihew* seems to have have thought himself justified in using other securities — some bills of exchange — to get an additional sum from the estate of the acceptor. As he is not before their Lordships, they abstain from commenting on his conduct, which he has had no opportunity of justifying or extenuating before them. But this impropriety—if it be an impropriety—does not affect the Appellant *Gavin*.

The grounds on which their Lordships have arrived at a conclusion in favour of *Gavin* render it unnecessary to consider the many grave equitable considerations, which were alleged on his behalf, as distinguishing his case from that of Mr. *Clerihew*, and as an answer to the suit, or as leading to a modification of the relief given.

Being of opinion that the very foundation of the Plaintiff's suit fails, they will recommend Her Majesty to allow the appeal with costs, to reverse the judgment of the Supreme Court, and to direct that in lieu thereof a decree be made dismissing the appeal

to that Court from the decree of the Court of First Instance, with costs, and to remit the cause to the Court in *Ceylon*, with directions to cause the property to be restored to the Appellant, and to take an account of the profits of the estate received by the Respondent, and of the amount of compensation (if any) for any damage which the property has sustained during the Respondent's possession, which are to be paid by the Respondent to the Appellant.

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Solicitors for the Appellant: *Wilson, Bristows, & Carpmael.*
Solicitors for the Respondents: *Kinsey & Ade.*

ALBERT BIRMINGHAM MILLER, OFFICIAL ASSIGNEE OF THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS AT CALCUTTA . . . . APPELLANT;

AND

THOMAS BARLOW . . . . . RESPONDENT.

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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Indian Insolvent Act, 11 & 12 *Vict. c.* 21—*Insolvency — Fraudulent preference—Interest—Money paid into Court—Bengal Letters Patent of* 1865, *s.* 36—26*th rule of High Court—Appellate jurisdiction—Judges differing in opinion—Affirmance.*

A Firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also, the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one Creditor to others after a debt has been incurred.

Proceedings were taken under the *Indian Insolvent Act*, 11 & 12 Vict. c. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the *Bank of Bengal*. In a suit brought in the High Court at *Calcutta*, by *A.* against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court:—*Held*, on the Court making a decree in favour of the Plaintiff, that the High Court, being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee.

A cause was heard before a single Judge of the High Court, and a decree

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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made by him dismissing the suit. An appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it ought to be affirmed; and, under the 36th section of the Letters Patent of 1865, creating the High Court, a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing any opinion whether the 36th section was applicable, having regard to the 26th rule of the High Court, directed the appeal to be heard on the merits.

THE question involved in this appeal respected the right of the Appellant to the proceeds of goods bought by the Respondent at *Manchester*, and shipped through the Firm of *Small & Co.*, in *London*, to *Balfour & Co.*, at *Calcutta*, for sale under an agreement between these parties. The proceeds of the sale were claimed as against the Respondent by *Cochrane*, the former Official Assignee of the Court of Insolvent Debtors at *Calcutta*, of one *James Hamilton Robinson*, an Insolvent, who was one of the partners, and at the time of the transaction hereinafter mentioned the resident partner at *Calcutta* of the Firm of *Balfour & Co.*, the consignees for sale.

The suit was instituted by the Respondent against *Cochrane*, as the Official Assignee of the estate of *Lewis Balfour*, Senior, and *James Hamilton Robinson*, two of the partners in the Firm of Messrs. *Balfour & Co.* The firm of *Balfour & Co.* consisted of *Lewis Balfour*, Senior, *James Hamilton Robinson*, and *Lewis Balfour* the younger. At the time of presenting the petition of insolvency, on the 17th of February, 1867, by *James Hamilton Robinson*, the other two Partners were in *England*.

The Firm of *Balfour & Co.* carried on trade as Merchants in *Calcutta* for many years, and the Firm of *Small & Co.*, in *London*, was the corresponding House in *England*, with whom the Firm of *Balfour & Co.* had been connected in business for many years. Various shipments were made, from time to time, by the Firm of *Small & Co.* to the Firm of *Balfour & Co.*, not merely on account of the Firms of *Balfour & Co.* and *Small & Co.*, but on account of others in connection with the two Firms. In the year 1862 an agreement in respect of the purchase and shipment of goods to *Calcutta* was entered into between the Firms of *Balfour & Co.*, *Small & Co.*, and *Bolton & Barlow*, Merchants, of *Manchester*, the effect of which was that such goods as *Small & Co.* and *John S. Bolton & Barlow* should deem advisable should be bought by *John*

S. Bolton & Barlow, and *John S. Bolton & Barlow* should charge no commission for buying and examining the goods, but to charge only for packing and making up the goods. *Small & Co.* were to effect marine insurance, charging no commission. *John S. Bolton & Barlow* were to draw at six months on *Small & Co.*, for costs of goods, including packing charges. The Bills were to be discounted by *Overend, Gurney, & Co.*, at 1½ per cent. in excess of Bank minimum rate, *Balfour & Co.* to remit their three months' or six months' drafts, as might appear most desirable, on *Small & Co.*, in favour of *John S. Bolton & Barlow*, which *Overend, Gurney, & Co.* agreed to take at 1½ per cent. above Bank minimum rate for three months, and 1½ per cent. for six months, as provision for said six months' drafts. And it was further provided that *Balfour & Co.* on sale of goods were specially to remit proceeds to *Overend, Gurney, & Co.* in first-class Bills drawn in favour of *Overend, Gurney, & Co.*, and *Overend, Gurney, & Co.* agreeing to give up *Balfour & Co.'s* drafts on *Small & Co.* on receipt of remittances under rebate, *Balfour & Co.* to charge no commission for settling or guaranteeing sales, merely charging actual disbursements incurred. In the event of *Small & Co.* being under cash advances, *John S. Bolton & Barlow* agreed to find cash for one-third the amount. Under the agreement the three several Firms were jointly interested as Partners in the profit or loss arising on such shipments.

In pursuance of this agreement, goods were, from time to time, purchased by the firm of *John S. Bolton & Barlow*, and shipped to the Firm of *Balfour & Co.*, in *Calcutta*, until some time in 1863, when *John S. Bolton* retired from the Firm of *John S. Bolton & Barlow*, which thenceforward was carried on under the style of *Thomas Barlow & Brother*. After the retirement of *John S. Bolton* the agreement was adhered to and adopted in all respects by *Thomas Barlow* and the Firms of *Balfour & Co.* and *Small & Co.*, and various shipments were made to *Balfour & Co.* on triplicate account for a series of years, except that *John S. Bolton* had no interest therein. After the failure of *Overend, Gurney, & Co.*, the remittances were made to the Firm of *Small & Co.* by the Firm of *Balfour & Co.*

In the months of September, October, and November, 1866, *Thomas Barlow* purchased and shipped in terms of the original agree-

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ment, certain goods to Messrs. *Balfour & Co.* The goods so shipped arrived in *Calcutta*, Bills of lading duly indorsed of the same having been previously received by the Firm of *Balfour & Co.*, at *Calcutta*, and which Bills so duly indorsed came to the possession of *James Hamilton Robinson*, the only partner of the Firm of *Balfour & Co.* then residing in *Calcutta*.

In December, 1866, or, at latest, on the 1st of January, 1867, an agreement was come to between the Respondent and *Small & Co.* and *Balfour & Co.*, whereby, in consideration of the Plaintiff taking upon himself solely all the risk and responsibility attaching to the shipments (which had not then arrived in *India*), and discharging *Small & Co.* and *Balfour & Co.*, from all liability to pay any losses which might accrue thereon, those Firms respectively transferred, assigned, and made over to Respondent all their respective right, title, and interest in the said shipments. This agreement was reduced to writing in the form of a Letter from the Respondent's Firm to *Balfour & Co., Calcutta*, and signed by the Respondent for *Thomas Barlow & Brother*, by *Small & Co.*, and by *Lewis Balfour* the elder for *Balfour & Co.*

The letter was in terms as follows:—

"*Manchester*, 2nd January, 1866.

"Messrs. *Balfour & Co., Calcutta.*

"Dear Sirs,—Referring to the goods shipped on triplicate a/c under special agreement against which Messrs. *Small & Co.* have given their acceptances, you will please hand over all such goods (particulars of which we enclose) to Messrs. *Barton, Baynes, & Co., Calcutta.* We agree to take said goods on our own risk and responsibility. We have agreed to return to Messrs. *Small & Co.* the following acceptances:—

£	s.	d.					
"2,943	8	2	.	due 13th March, 1867	a/c	*Warwick Castle.*
589	3	0	.	„ 1st April	„	„	*Tantallon Castle.*
4,707	5	2	.	„ 9th May	„	„	*Kenilworth Castle.*
208	0	11	.	„ „	„	„	ditto.
804	5	2	.	„ 22nd May	„	„	*Riversdale.*

"In the meantime, until we hear that you have handed over the goods, we have made *Williams, Deacon, & Co.* custodians for said

acceptances, also of £217. 1*s.* 10*d.* paid by Messrs. *Small & Co.*, for charges on account of the said goods. We refer you at foot to Messrs. *Small & Co.'s* signature, and also to Mr. *Balfour* and Messrs. *Mattheson & Co.'s* signatures, in confirmation of this. Messrs. *Mattheson & Co.* of course sign this in case any goods have arrived in *Calcutta*, and are delivered to *Jardine, Skinner, & Co.* of *Calcutta*, and this Letter is sufficient authority in such case for Messrs. *Jardine, Skinner, & Co.* to hand over the goods to *Barton, Baynes, & Co.*

"We confirm the above.
"*Mattheson & Co.*
"*Small & Co.*
"*Lewis Balfour.*"

"We are, dear Sirs,
"Yours truly,
"*Thomas Barlow & Bro.*"

The Respondent, *Lewis Balfour*, for *Balfour & Co.* and *Small & Co.*, by such letter concurred in directing *J. H. Robinson*, the only partner of *Balfour & Co.* then resident at *Calcutta*, to hand over the said shipments to Messrs. *Barton, Baynes, & Co.*, of *Calcutta*, as Respondent's agents, which he accordingly did in January, 1867, and Messrs. *Barton, Baynes, & Co.* gave him the following receipt:—

"*Calcutta*, May 16, 1867.

"Received from Messrs. *Balfour & Co.* the under-mentioned invoices and Bills of lading as instructed by Messrs. *Thomas Barlow & Brother, Manchester.*

Warwick Castle	78/*b.*
Tantallon Castle	17/*b.*
Riversdale	30/*c.*
Kenilworth Castle	143/*b* and *c.*

proceeds to be remitted to Messrs. *Alexander Cunliffe & Co.* for special appropriation.—*B. B. & Co.*"

After the receipt of these Bills of lading, and on the 15th of January, 1867, *James Hamilton Robinson* received a telegram from *London*, from *Lewis Balfour*, directing him to deliver the goods so shipped on triplicate account as aforesaid to the Firm of *Barton, Baynes, & Co.* In pursuance of this telegram *Robinson*, on the 18th of January, 1867, indorsed and delivered over the Bills of lading and goods to Messrs. *Barton, Baynes, & Co.* At such time

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the firm of *Balfour & Co.* had not merely stopped payment, but had been in insolvent circumstances for some years.

On the 17th of February, 1867, *Robinson* presented his petition of insolvency to the Insolvent Court in *Calcutta*, and was duly declared insolvent.

The then Official Assignee, on the 1st of March, 1867, demanded the re-delivery of the goods and documents from the Firm of *Barton, Baynes, & Co.*, who refused to comply with such demand.

An application to enforce the demand was made to the Insolvent Court, and by an Order of that Court of the 4th of March, 1867, Messrs. *Barton, Baynes, & Co.* were directed to shew cause, on the 11th of March, why they should not re-indorse and deliver over to the Official Assignee all goods, Bills of lading, and other documents connected with such goods. The parties appeared and shewed cause against such Order, which was, however, on the 16th of March, 1867, made absolute. *Barton, Baynes, & Co.*, in compliance with the Order, re-delivered over the goods, or the produce thereof, and the Bills of lading and other documents connected therewith.

Barlow then brought the present suit, on the 29th of June, 1867, in the High Court of *Calcutta* against the Official Assignee claiming the goods and the produce thereof, and also by his plaint claimed interest on the amount received and made over to the Official Assignee; and further prayed that the Order of the Insolvent Court might be cancelled.

The Official Assignee filed his written statement, setting up the several matters aforesaid, and prayed that the suit might be dismissed, as the relief sought could have been obtained in the insolvency proceedings.

The suit came on for hearing before the High Court in its ordinary original civil jurisdiction. Witnesses were examined, and on the 15th of June, 1868, Mr. Justice *Norman*, who sat alone, by his judgment decided in favour of the Official Assignee and against the claim of *Thomas Barlow*, on the ground of the transfer being fraudulent and void as against the Creditors of *Balfour & Co.*

Barlow appealed to the High Court in its appellate jurisdiction, and by his memorandum of appeal submitted that the judgment was erroneous, on the following grounds:—First, as the Court found that, under the agreement mentioned in the plaint, the goods in

question were shipped to *Balfour & Co.*, and by the terms of the agreement the proceeds of the goods were specifically appropriated for remittance home in first-class Bills; secondly, that the transfer of the 2nd of January, 1867, was *bonâ fide*, and for consideration; thirdly, that, even if no such transfer were established, the goods were placed in the hands of *Barton, Baynes, & Co.*, not by way of fraudulent transfer or preference, but to carry out the terms of the contract under which the goods were shipped; fourthly, that at the time of the insolvency of *Robinson* the goods were not in his order or disposition; and, fifthly, that, at any rate, the Plaintiff had a joint interest in the goods and their proceeds, and the Court had jurisdiction to interfere, and ought to have interfered, to prevent the proceeds being divided between the general Creditors of *Robinson*.

The Respondent, by a memorandum of objections, under sect. 348 of Act No. VIII., of 1859, submitted that Mr. Justice *Norman* should have declared that the Firm of *Balfour & Co.* were partners with the Firms of *Small & Co.* and *Thomas Barlow* in the goods in the plaint mentioned, and that the Firm of *Balfour & Co.* were held out and known as the only reputed Owners of the goods then in *Calcutta;* and that the Court should have found that the goods, at the time of making over the same by *Robinson*, the only partner of Messrs. *Balfour & Co.* then in *India*, and at the time of presenting the petition on which the order of insolvency was granted, were, with the consent of the Plaintiff as such co-partner, in the order and disposition of *Robinson*, vested in the then Respondent, under such adjudication, on behalf of the general Creditors of *Balfour & Co.*

The Chief Justice, Sir *Barnes Peacock*, was in favour of reversing the decree of the 15th of June, 1868. Mr. Justice *Markby* gave his opinion for sustaining the decree; but the Judges of the appellate Court being equally divided, the decree was reversed, in accordance with sect. 36 of the Letters Patent constituting the High Court. The Chief Justice proposed that the suit should be reheard before a fuller bench of Judges, but Mr. Justice *Markby* was of opinion the Court had not power to direct the case to be so reheard, and declined to accede to any such rehearing.

The Chief Justice in his judgment expressed his opinion that there was a valid and *bonâ fide* transfer to the Respondents by the

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agreement of the 2nd of January, 1867; that there was no fraud or fraudulent preference within sect. 23 of the *Indian Insolvent Act*, 11 & 12 Vict. c. 21, and that the doctrine of reputed ownership under that Act had no application; and, moreover, that according to the true construction of the original agreement of 1862, there was a specific appropriation of the proceeds of the said shipments to meet the Bills drawn on and accepted by *Small & Co.* for the price, and that such specific appropriation bound the said shipments, and their proceeds in the hands of *Balfour & Co.* and their Assignees, and, *à fortiori*, was good against the Assignee of one or two members of the Firm. In his judgment the Chief Justice said: "It appears to me that this transaction of the 2nd of January was intended by the parties to be carried out, that it was honest and *bonâ fide*, and that the property in the goods passed by it to Messrs. *Barlow Brothers*. Further, I hold that if the property did not pass to *Barlow Brothers*, the proceeds were specifically appropriated for taking up the Bills of *Balfour & Co.* on *Small & Co.*, and until those Bills were paid Mr. *Robinson* had no interest in the goods which could justify his Assignee in stopping the remittance of the proceeds, or of taking the property out of the actual possession of the Plaintiff's Agents, Messrs. *Barton, Baynes, & Co.* If the transfer of the 2nd of January, 1867, did not transfer the property and Mr. *Robinson's* interest under it, it is clear that Mr. *Robinson* was not entitled to the proceeds, but merely to one-ninth of the profits, if any, after all the costs and expenses should have been paid out of the proceeds. The speculation, however, as already shewn, resulted in a loss. It has been urged that *Small & Co.* were in insolvent circumstances when the letter of the 2nd of January was signed, but *Small & Co.'s* Assignees have not interfered. In that respect the case resembles *Thayer* v. *Lister* (1). The Assignee of *Robinson* and *Balfour* had nothing to do with Messrs. *Small & Co.'s* insolvency or bankruptcy." Then, after observing that Respondent had performed the agreement on his part, the Chief Justice proceeded:—"The question then is, whether the Assignee of *Robinson*, who would have been entitled to only one-third of one-third, or one-ninth of the profits, if any, would have been entitled to stop the remittances if the goods had not been

(1) 30 L. J. (Ch.) 427.

delivered over to the Plaintiff's Agent, or was justified in taking the goods or the proceeds out of the hands of the Plaintiff's Agent, and to administer them for the benefit of the general body of Creditors of *Robinson* and *Lewis Balfour* the elder. It appears to me that he is not, and that it ought to be declared that the goods and proceeds are the property of the Plaintiff."

Mr. Justice *Markby* agreed in opinion with Mr. Justice *Norman*, and based his decision on the grounds of the three Firms being partners in the shipments in question, and of the agreement of the 2nd of January, 1867, being a fraudulent preference of Respondent by *Small & Co.* and *Balfour & Co.*, stating that it was rather a question of fact than of law. On the point of the reputed ownership of the goods by *Balfour & Co.* under the *Insolvent Act*, he said that, so far as he had formed an opinion, he entirely concurred with the Chief Justice. He also intimated an opinion that it was not open to Respondent on the pleadings and issues to contend that the proceeds of the shipments were specifically appropriated.

By the decree made thereon in favour of the Plaintiff, the Defendant was ordered to pay the Plaintiff the sum of Rs.95,279. 10a. 1p., together with interest at 6 per cent. from the dates and upon the amounts in the decree specified, to the date of realization.

The Appellant appealed to Her Majesty in Council from this decree.

After the appeal to *England*, *Albert Birmingham Miller* was appointed Official Assignee and Assignee of the estate and effects of *Robinson* and *Lewis Balfour* the elder, in the place of *John Cochrane*, the original Appellant; and, by an Order in Council, *Miller* was substituted in the appeal in the place of *Cochrane*.

Sir *R. Palmer*, Q.C., and Mr. *J. D. Bell*, for the Appellant: —

There is a preliminary objection, which, if sustained, will render any further consideration with respect to the merits unnecessary. The cause was first heard before Mr. Justice *Norman*, who dismissed the suit, and such dismissal having been affirmed by Mr. Justice *Markby*, who sat with the Chief Justice, Sir *Barnes Peacock*, on the hearing of the appeal, but who differed from him, we submit, that the High Court in its appellate jurisdiction ought to have affirmed the decree, and was not warranted in giving a decision against the

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Appellant. The 36th section of the Letters Patent of 1865, constituting the High Court at *Bengal* (1) is not in any way contradicted or affected by the 26th rule of the High Court (2), which, in fact, only explains the 36th clause of the Letters Patent, and the appellate Court ought, therefore, to have dismissed the appeal.

THEIR LORDSHIPS declined expressing any opinion on this point, and desired the Appellant's Counsel to proceed on the merits.

Then upon the merits our contention is, that neither in Law nor Equity was there any such specific appropriation of the proceeds of the sale of the goods, to support the decree pronounced against the Official Assignee, awarding payment to the Plaintiff. Even if it should be held to have been a specific appropriation of the proceeds of the goods in a suit properly framed, which this was not, yet we submit that the Order of the Insolvent Court, pronounced on the 16th of May, 1867, not having been appealed against, bound the Appellant as to the matter decided therein, and he had no right to sue: *Garbett* v. *Veale* (3); but having submitted to the jurisdiction of the Insolvent Court, he should have preferred his claim there. The assignment of goods to the Plaintiff, on which he grounds his suit, so far as the assignment purported to be a rescission of the contract or agreement theretofore existing between the Plaintiff and the Firm of *Balfour & Co.* and *Small & Co.*, was absolutely null and void against the Official Assignee: *Dutton* v.

(1) Sect. 36 provides, that any function directed to be performed by the High Court in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or Division Court, constituted under the provisions of the Act, the 24 & 25 Vict. c. 104, "and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."

(2) Rule 26 directs that "appeals from the decision of one Judge in the exercise of ordinary original civil jurisdiction shall be heard and determined by at least two other Judges; and in case the two Judges who exercise the appellate jurisdiction differ in opinion, they may direct that the case shall be re-heard before a Division Court, consisting of themselves and some other Judge, or Judges; and if no such Order be made, the decision shall be affirmed." See Rules, *Macpherson's* New Civil Proceedings for *Brit. India*, Appx. p. cxvi. [Ed. 1871.]

(3) 5 Q. B. 408, 414.

Morrison (1); *In re Wait* (2); *Barker* v. *Goodair* (3); *Taylor* v. *Fields* (4); *Young* v. *Keighly* (5). [THE LORD JUSTICE JAMES:— This differs from ordinary partnerships. It is a series of joint adventures.] The two Firms of *Balfour & Co.* and *Small & Co.* at the time of the assignment being in utterly insolvent circumstances, and the assignment made within two months of the filing of the petition of *Robinson*, such an assignment was a voluntary and fraudulent preference, in no way binding upon the Official Assignee, or the Creditors of the Firm of *Balfour & Co.* Fraud will vitiate a contract of sale: the principles are clearly laid down in *Attwood* v. *Small* (6). It was a colourable and fraudulent assignment as against the general body of the creditors of Messrs. *Balfour & Co.*, whose consent was in no way obtained by *Lewis Balfour*, Senior, the only member of the Firm of *Balfour & Co.* who entered into the agreement. Indeed the Firm of *Small & Co.* and *Lewis Balfour*, Senior, were precluded from making such assignment by being in insolvent circumstances. The indorsement of the Bills of lading and delivery over of the goods to *Barton, Baynes, & Co.* by *Robinson*, having been made within two months before insolvency, were acts fraudulent and void under the 24th clause of the *Indian Insolvent Act*, 11 & 12 Vict. c. 21, which is similar to the Statute, 7 Geo. 4., c. 57, s. 32, under which Statute, in similar circumstances, an assignment has been held void as against the Official Assignee: *Becke* v. *Smith* (7). So by the *Bankruptcy Act*, 12 & 13 Vict. c. 106, s. 126: *Marks* v. *Feldham* (8); and by the *Jamaica Insolvent Act*, 11 Vict. c. 28, s. 67: *Nunes* v. *Carter* (9). Even if such acts could be deemed merely voidable, as against the Official Assignee, by the proceeding in the Insolvent Court and the High Court, the Official Assignee sufficiently manifested his opposition to the same, and his right to treat the same as invalid; and we rely on both such grounds, whether fraudulent and void, or merely voidable; and we submit that the 24th clause of the above Act not merely renders such acts fraudulent and void, but expressly and

(1) 17 Ves. 193.
(2) J. & W. 605–8.
(3) 11 Ves. 85.
(4) 4 Ves. 396.
(5) 15 Ves. 557.
(6) 6 Cl. & F. 232.
(7) 2 M. & W. 196.
(8) Law Rep. 5 Q. B. 279.
(9) Law Rep. 1 P. C. 349.

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positively directs that such acts shall be deemed fraudulent and void from their inception.

Again, the goods were in the order and disposition of the Firm of *Balfour & Co.* up to and at the time of the adjudication of insolvency against *Robinson*, and as such passed to, and became vested in, the Official Assignee of *Robinson*, under the provisions of the 23rd section of the *Indian Insolvent Act*, 11 & 12 Vict. c. 21.

And, lastly, we submit that, with respect to interest, the Official Assignee having received the proceeds of the goods under the Order of the Insolvent Court, and the amount so received having been paid into the Bank in accordance with the rules of the Court, and no application being made to him or the Court to invest the same, the Plaintiff was not entitled to the interest decreed.

THEIR LORDSHIPS directed the Respondent's Counsel to confine themselves to the question of interest.

Mr. *Jessel*, Q.C., Mr. *C. E. Pollock*, Q.C., and Mr. *Bowring*, for the Respondents:—

Interest was properly allowed by the Court below. The proceeds of the sale of the goods was paid into Court, and no step was taken by the Official Assignee to invest the proceeds. In *Young* v. *Guy* (1) a party recovered payment at law, but on equitable grounds repayment was decreed, and the Court held that the Plaintiff in equity was entitled to interest on the amount recovered from the time of its payment.

1871 *July* 20.

Judgment was reserved, and now delivered by,

THE LORD JUSTICE MELLISH:—

This was a suit brought in the High Court of *Calcutta* by *Thomas Barlow*, who traded under the style of *Thomas Barlow & Brother*, against the Defendant, who is the Official Assignee of the Court for the Relief of Insolvent Debtors at *Calcutta*.

The plaint set out the terms of an agreement made in 1862 by the Plaintiff's Firm, the Firm of *Small & Co.*, of *London*, and the Firm of *Balfour & Co.*, of *Calcutta*, consisting of *Lewis Balfour* the elder, *James Hamilton Robinson*, and *Lewis Balfour* the younger, respecting goods to be bought by the Plaintiff's Firm at *Manchester*,

(1) 8 Beav. 147.

and shipped by *Small & Co.* to *Balfour & Co.* at *Calcutta*, by which each of the three Firms was to take one-third share of profit or loss, the Plaintiff's Firm to draw Bills at six months on *Small & Co.* for the cost of the goods, the Bills to be discounted by *Overend, Gurney, & Co.*, *Balfour & Co.* to remit Bills on *Small & Co.* as a provision for the six months' Bills, and *Balfour & Co.*, on the sale of the goods, specially to remit the proceeds to *Overend, Gurney, & Co.*, and *Overend, Gurney, & Co.* thereupon to give up *Balfour & Co's* drafts on *Small & Co.* under rebate. The plaint states, that the Plaintiff, under that agreement, in September and October, 1866, purchased and shipped goods to *Balfour & Co.* in *Calcutta*, and that after the goods were shipped another agreement was come to between the Plaintiff, *Small & Co.*, and *Balfour & Co.*, whereby, in consideration of the Plaintiff taking upon himself all risk attaching to the shipments, and discharging the Firms of *Small & Co.* and *Balfour & Co.* from all liability to pay any losses, these Firms made over to the Plaintiff all their respective right, title, and interest in the shipments; that shortly after the Plaintiff directed *Balfour & Co.* to hand over the shipments and documents relating to the same to *Barton, Baynes, & Co.*, and that the Bills of lading were accordingly handed over by *Balfour & Co.* to the Firm of *Barton, Baynes, & Co.*; that the shipments arrived in *Calcutta*, and were taken possession of by *Barton, Baynes, & Co.*, and the larger portion thereof sold on account of the Plaintiff; that *James Hamilton Robinson* filed his petition in the Court for the Relief of Insolvent Debtors at *Calcutta* on the 7th of February, 1867, and *Lewis Balfour* the elder on the 18th of May, 1867; that the Defendant, as such Assignee, on the 1st of March, 1867, demanded possession of the goods from *Barton, Baynes, & Co.*, and on their refusal to comply with the demand, he procured an Order from the Insolvent Court requiring them to reindorse and redeliver to the Defendant all the documents and goods belonging to the estate of the Insolvent as were then in their possession, and to account to him for all they had parted with; that in consequence of that Order, *Barton, Baynes, & Co.* handed over twelve bales of goods to the Defendant, and paid to him the net proceeds of those which had been sold, Rs.90,563. 63 a. 1 p.

The Plaint concluded with a prayer that the Plaintiff's rights in

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respect of the goods, or the net proceeds thereof, and money, might be declared, and that the Defendant might be directed to pay the same, with interest, to the Plaintiff.

The Defendant, in his answer, denied the alleged agreement by which the Firms of *Small & Co.* and *Balfour & Co.* assigned their interest in the shipments to the Plaintiff; and also alleged that such agreement, if made, and the delivery of the Bills of lading and goods to *Barton, Baynes, & Co.* under it, was a fraud upon the laws relating to Bankruptcy and Insolvency; that it was void from having been made within two months of the insolvency of *James Hamilton Robinson;* and that the goods at the time of *James Hamilton Robinson* filing his petition, were in his possession, order, and disposition, with the consent of the true Owner.

The case came on to be tried before Mr. Justice *Norman;* and it was proved at the trial, that the original agreement for the consignment of goods to *Calcutta* was acted upon by the three firms up to the failure of *Overend, Gurney, & Co.*, in May, 1866; that after that time the parties never obtained any Firm to take the place of *Overend, Gurney, & Co.;* that the Plaintiff, nevertheless, bought the goods in question at *Manchester*, and shipped them through *Small & Co.*, in four Ships, to *Balfour & Co.*, in *Calcutta;* that the Plaintiff drew Bills on *Small & Co.*, who accepted them for the price of the goods, and discounted the Bills with Messrs. *Cunliffe.* A correspondence was given in evidence between the Plaintiff and *Small & Co.*, and *Lewis Balfour*, Senior, who was then in *London*, during the autumn of 1866, with reference to procuring a Firm to supply the place of *Overend, Gurney, & Co.*, but no agreement was come to on that subject; that early in December, 1866, *Small & Co.* stopped payment, and dishonoured Bills drawn by *Balfour & Co.* That it was known to all the parties in *London* that the stoppage and insolvency of *Small & Co.* would necessarily involve the stoppage and insolvency of *Balfour & Co.* That on the 15th of December, *Small & Co.* wrote to the Plaintiff:—"Pending the completion of arrangements, we have sent out a telegram, jointly with Messrs. *Balfour*, directing all funds and goods then in their hands to be handed over to *Jardine, Skinner, & Co.*" And on the 18th of December the Plaintiff wrote to *Balfour & Co.* at *Calcutta*:—"In consequence of correspondence

with Messrs. *Small & Co.*, you will please hand over the goods as per annexed list, to Messrs. *Barton, Baynes, & Co.* They are bought, you are aware, under special agreement, in triplicate account." On the 2nd of January, 1867, the agreement for the transfer of *Small & Co.'s* and *Balfour & Co.'s* interests in the shipments was made, and is contained in a Letter of that date from the Plaintiff to *Balfour & Co.*, and was also signed in the corner by *Small & Co.*, and *Lewis Balfour*. [His Lordship read the Letter, *ante*, p. 736, and proceeded :—]

The subsequent facts were proved to have taken place as alleged in the plaint. Upon this evidence Mr. Justice *Norman* held that the transfer of the interest of *Balfour & Co.* to the Plaintiff by the agreement of the 2nd of January, 1867, was fraudulent and void as against the Defendant, and on that ground dismissed the suit with costs. From that judgment an appeal was heard before two of the Judges of the High Court, the Chief Justice Sir *Barnes Peacock*, and Mr. Justice *Markby*. Mr. Justice *Markby* was of the same opinion as Mr. Justice *Norman*, and thought his judgment ought to be affirmed, but the Chief Justice was of a contrary opinion, and, in accordance with his opinion, and under sect. 36 of the Letters Patent of the High Court, the judgment of Mr. Justice *Norman* was reversed, and a decree was made in favour of the Plaintiff, and the Defendant was ordered to pay to the Plaintiff Rs.95,279. 10a. 1p., together with damages in the nature of interest at 6 per cent. from the days when the cause of action as to each part of the principal arose up to realization, with the Plaintiff's costs of the original suit and of the appeal.

From this decree an appeal has been brought before their Lordships, and a preliminary objection to the decree was raised, that the 36th clause of the Letters Patent of the High Court was not applicable; and that under the rules made by the Judges of the High Court, the Judges who heard the appeal being equally divided in opinion, judgment of affirmance of the decree of the Court below ought to have been entered. Their Lordships do not think it necessary to give any opinion on this question. They are of opinion that it is their duty to hear and decide the case on the merits, and that it is quite immaterial how the judgment in the High Court ought to have been entered in consequence of the

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difference of opinion between the Judges, because the judgment of the High Court, as entered, cannot be reversed, if it was right upon the merits.

With respect to the case on the merits, it is clear that the goods were not in the order and disposition of *James Hamilton Robinson* at the time he petitioned the Insolvent Court, because he had previously indorsed and handed over the Bills of lading relating to all the goods to *Barton, Baynes, & Co.*, and the principal question to be determined is, was the transfer of the interest of *Balfour & Co.* in the shipments to the Plaintiff, by the agreement of the 2nd of January, 1867, binding on the Defendant. Their Lordships are of opinion that *Lewis Balfour* the elder, had, under the circumstances of this case, authority as a Partner in the firm of *Balfour & Co.* to bind his Firm to that agreement by attaching his signature to the Letter of the 2nd of January, 1867, and that, therefore, the agreement was binding upon the Defendant unless the Defendant can make out that the agreement was rendered void by the provisions of the 11 & 12 Vict. c. 21, or was a fraud upon the Creditors of *Balfour & Co.*

It is desirable, in the first instance, to consider what was the position and the legal rights of the parties at the time the agreement of the 2nd of January, 1867, was entered into. Mr. Justice *Markby*, in his judgment, states his opinion to be, that if the assignment of the 2nd of January, 1867, had not been made, the general Creditors of *Balfour & Co.* would have been entitled to one-third of the goods. Their Lordships cannot agree with this opinion. It is obvious that even if Mr. Justice *Markby* was right in thinking that the property in the goods whilst on board Ship was vested in the three Firms; still, that the Creditors of *Balfour & Co.* could have no right to any part of the proceeds of the goods until all the liabilities of the three Firms, with reference to the adventure, were first satisfied; and one of these liabilities was an obligation to satisfy the Bills drawn by the Plaintiff on *Small & Co.* Their Lordships also agree with the Chief Justice, and for the reasons stated by him, that neither the circumstances that the parties had not procured any firm to supply the place of *Overend, Gurney, & Co.*, nor the insolvency of *Small & Co.*, and of *Balfour & Co.*, interfered with the right of the Plaintiff to have the agree-

ment between the three Firms carried out: that is to say, his right to have the goods sold in *Calcutta*, and the proceeds returned to *England* in good Bills, for the purpose of satisfying the Bills drawn by the Plaintiff on *Small & Co.*

Their Lordships are also of opinion that the insolvency of *Balfour & Co.* deprived them of the right of acting as Factors for the three Firms in the sale of the goods at *Calcutta*, and the remission of the proceeds to *England*, and that therefore the orders to transfer the goods first to *Jardine, Skinner, & Co.*, and afterwards to *Barton, Baynes, & Co.*, which were sent out to *Calcutta* in December, 1866, were proper orders, and their Lordships think that *James Hamilton Robinson* would have been perfectly justified in handing over the Bills of lading to *Barton, Baynes, & Co.*, even if the agreement of the 2nd of January, 1867, had never been made, and the telegram which was sent out in consequence of it never sent out. Such, then, being the position of the parties, was the agreement of the 2nd of January, 1867, a fraudulent agreement as respects the Creditors of the firm of *Balfour & Co.* When this agreement was entered into it was quite uncertain whether the consignment of these goods to *Calcutta* would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion that there is nothing fraudulent or improper in an insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, he will be ready to rescind the bet before the event happens, and he is not bound to take the chance of winning for the benefit of his Creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one Creditor to others after a debt has been incurred. In the present case it seems to their Lordships clear that, on the 2nd of January, 1867, the Plaintiff was not a Creditor of *Balfour & Co.*, and could not have proved against the estate of *Balfour & Co.* in respect of these transactions, and this alone conclusively proves that the agreement was not a fraudulent preference.

It remains to be considered, whether the agreement of the 2nd of January, 1867, and the transfer of the Bills of lading under it,

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was rendered void by the 11 & 12 Vict. c. 21, s. 24, and their Lordships are clearly of opinion that the case does not come within that section. The fact that the Plaintiff was not at the time a Creditor of the Firm of *Balfour & Co.*, takes the case out of the section, and, moreover, the agreement was not a voluntary assignment by *Balfour & Co.*, and still less by *James Hamilton Robinson*, of any defined interest in the goods, but was an agreement whereby, in consideration of being freed from all liability to loss, *Balfour & Co.* sold to the Plaintiff their interest in any profit that might be made in the speculation. A further objection was taken that, even assuming the judgment of the Chief Justice to be correct on the general merits of the case, the Plaintiff was not entitled to interest. On this point it is material to observe that, in the account which was drawn up between *Barton, Baynes & Co.* and the Defendant as Official Assignee, interest is charged, and it, therefore, appears that by the wrongful act of the Defendant the Plaintiff has been deprived of money which was actually making interest, and their Lordships are of opinion, that under these circumstances a Court of Equity would clearly be entitled to give interest; and it is by no means clear that even in a Court of Law, although the ordinary rule is that in actions for money had and received interest is not given, the fact of the Defendant having received interest would not be a sufficient ground for making the Defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given.

On the whole, their Lordships will recommend to Her Majesty that the decree of the High Court be affirmed, and this appeal dismissed with costs (1).

Solicitor for the Appellant: *T. Graham.*

Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

(1) See *Ex parte Copeland*, 3 Dea. & Ch. 199, and *Ex parte Prescott*, Ibid. p. 218.

JANE DAY . . . . . APPELLANT; J. C.*

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JANE DAY, AND OTHERS . . . . . RESPONDENTS. *July* 15, 17.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Tenancy at will—Statute of Limitations, 3 & 4 *Will.* 4, *c.* 27, *ss.* 2, 7, 34—*New South Wales Act, No.* 3 *of* 1837.

Tenant at will without interruption for more than twenty years, during which period he let and transferred portions of the land, with the knowledge, and without the interference of the Owner in fee: *held* to have acquired an indefeasible title against the Owner, whose right of entry after that period was barred by the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, ss. 2, 7, 34, introduced in *New South Wales* by Act, No. 3 of 1837.

THE question in this appeal was, whether a new Trial ought to be granted, in an action of ejectment, brought by the Appellant in the Supreme Court of *New South Wales*, for the purpose of establishing her title to certain land and buildings in the City of *Sydney*. The action was tried at *Sydney*, and a verdict was found for the Appellant. The Supreme Court afterwards made an Order for a new Trial, on the grounds, first, that the verdict was against evidence, and secondly, that the Judge misdirected the jury. From this Order the present appeal was brought.

The land in question formed part of an allotment granted in fee simple to *Thomas Day*, formerly of *Sydney*, hereafter distinguished as *Thomas Day*, Senior. The Appellant claimed under the Will of her deceased Husband, *Thomas John James Day*, who was a Son of *Thomas Day*, the Elder, and hereinafter designated as *Thomas Day*, Junior. The Respondents claimed under the Will of *Thomas Day*, Senior. The question of title depended upon the fact, whether *Thomas Day*, Junior, acquired an estate in fee simple by force of the Statute for the Limitation of actions relating to land, 3 & 4 Will. 4, c. 27 (1). The Appellant alleged that this statutory

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT), SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

(1) This Statute was adopted by the *New South Wales Act*, No. 3 of 1837.

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title was acquired, and the verdict in the action confirmed that conclusion. The Respondents denied that the facts proved brought the case within the operation of the Statute.

The circumstances of the case were as follows :—

In the month of May, 1842, *Thomas Day*, Senior, being Owner in fee of the land in question, let *Thomas Day*, Junior, into possession thereof, and he thenceforth occupied such land until his death in December, 1864.

It appeared from the evidence at the trial, that at various dates, commencing in or about the year 1852, and all within the period of twenty-one years from May, 1842, *Thomas Day*, Junior, let portions of the land sought to be recovered to various persons, on yearly and weekly terms, and received rent for the same, and transferred, or purported to transfer, his interest in a part of the land to his Brother, *William Day*, who let such part on various terms, and received rent for the same. *Thomas Day*, Senior, had notice of such lettings and transfer, at the times at which they took place respectively. The land sought to be recovered continued to be, to the knowledge and with the sanction of *Thomas Day*, Senior, in the occupation of *Thomas Day*, Junior, or of tenants paying rent to him, until his death in December, 1864, and thenceforth in the occupation of tenants paying rent to the Appellant, who was his Widow and devisee for life under his Will, until the 27th day of January, 1867, when *Thomas Day*, Senior, took possession of the land, and procured the tenants to attorn to him.

The action was tried before Sir *Alfred Stephen*, the Chief Justice of the Supreme Court, on the 23rd and 24th of November, 1868, when evidence to the above-stated effect was given. The Respondents' Counsel, however, submitted that the facts so stated, on behalf of the Appellant, amounted to a determination of the original tenancy at will created in May, 1842, and to the creation of a fresh tenancy; that the *Statute of Limitations* began to run in favour of *Thomas Day*, Junior, and of the Appellant, who claimed under him, only from such determination of the fresh tenancy, pursuant to the 7th section of the Statute, and that the Appellant had, therefore, acquired no title as regarded the Respondents, who claimed as Devisees of *Thomas*

Day, Senior, the Owner in fee. The Chief Justice directed the jury, that if the lettings and transfer were in excess of the authority or leave given by *Thomas Day*, Senior, the tenancy at will ceased, and that even if they were not a violation or in excess of the actual leave or authority, still the tenancy at will was determined, because the legal interest became forfeited by assuming to give a greater interest to a Stranger, but that such forfeiture could be waived; that if *Thomas Day*, Senior, knew of such lettings and transfer, but nevertheless suffered his authority to *Thomas Day*, Junior, to continue, the forfeiture was waived, and the original tenancy was not determined; and that, whether there was a determination of the original tenancy or not, the *Statute of Limitations* having begun to operate in and from May 1843, would not be defeated except by the creation of a new tenancy, and that if *Thomas Day*, Senior's, waiving the forfeiture relied on was merely passive, thereafter suffering *Thomas Day*, Junior, to remain, but not entering into any new arrangement or giving a new authority; the Statute was not avoided. The jury, in answer to questions put by the Chief Justice, found that *Thomas Day*, Junior's, letting of portions of the premises and transferring a portion of them, was not in violation of *Thomas Day*, Senior's, authority to him, and that there was not at any time after such letting or transfer a fresh tenancy at will created by *Thomas Day*, Senior; that he did not thereafter, with knowledge of the act or acts done by *Thomas Day*, Junior, give a new authority to occupy, and that *Thomas Day*, Senior, knew of the act or acts of letting or transfer, and so knowing assented thereto, and the jury thereupon, under the direction of the Chief Justice, returned a verdict for the Appellant.

The Respondents applied for and obtained from the Supreme Court a rule *nisi* for a new trial, on the ground that the verdict was against evidence, and that the Chief Justice misdirected the jury on those points of his charge above stated.

Upon the 1st of September, 1869, the rule was made absolute, and it was ordered that the verdict found for the Appellant should be set aside and a new trial had, and that the costs of the trial and of the motion should abide the event of the new trial. The majority of the Court, consisting of the Justices *Hargrave* and *Cheeke*, were of opinion, that the Chief Justice misdirected the

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jury, in telling them that the letting and transfer occasioned a forfeiture, which, however, might be waived so as to prevent a determination of the original tenancy at will; and held that these acts, with notice to *Thomas Day*, Senior, amounted to a determination of such tenancy, and that the statutory period began to run afresh from such determination. Mr. Justice *Hargrave* was also of opinion, that the Chief Justice's direction as to the manner in which a new tenancy at will might be created was erroneous, and that the jury ought to have been told that they might infer the creation of such a tenancy from the conduct of the parties. Mr. Justice *Cheeke* was also of opinion, that the verdict was against evidence. The Chief Justice, on the contrary, was of opinion, that the meaning of the Statute, 3 & 4 Will. 4, c. 27, s. 7, is, that in the case of tenancies at will the right of entry accrues upon the determination of the tenancy within the first year; and if not so determined at the end of such year, that the operation of the Statute having so begun to run, can be stopped only by the creation of a fresh tenancy (other than a tenancy by sufferance); and that the jury had been properly directed as to the manner in which such a fresh tenancy might be created, and had found according to the evidence.

The Appellant appealed from this judgment and the Order made thereon, to Her Majesty in Council.

Mr. *J. Brown*, Q.C., and Mr. *Laing*, for the Appellant:—

The question in this case depends upon the true construction of the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, which was adopted by the *New South Wales Act*, No. 3 of 1837. By the 2nd section of that Statute it is enacted, that no person shall make an entry or distress, or bring any action to recover land or rent, except within twenty years next after the time at which the right to make that entry or to bring such action shall have first accrued to him, or some person through whom he claimed; and by sect. 34 of the same Statute it is enacted, that at the determination of the period limited by the Act for making an entry, or distress, or bringing an action, the title of the person who might within that period have made such entry shall be extinguished; which means that such title is transferred to the person, on whose possession at any

time during that period he might have effectually made an entry. Now, what was the period limited by the Statute to *Day*, Senior, the original Owner, for making such entry? And that question is settled by the 7th section, which provides that, where any person is in possession or in receipt of profits of land as tenant at will, the right of the person entitled to make an entry or distress thereon, or bring an action to recover such land, shall be deemed to have accrued "either at the termination of such tenancy, or at the expiration of one year next after the commencement of such tenancy;" that is, to save the Statute, the tenancy must be determined either within the year, or at the end of the year. But in this case the tenancy at will of *Day*, Junior, terminated in May, 1843, when, or on the 1st of June following, *Day*, Senior, the Owner, must be taken to have been entitled, as on cessation of the tenancy, to enter on the land. This he never did; and the consequence of his neglect or omission to re-enter, was not to create a new tenancy at will, but, by force of the Statute, 3 & 4 Will. 4, c. 27, to continue the original tenancy at will, which would, the twenty years having expired, bar his right of re-entry: *Doe* d. *Bennett* v. *Turner* (1); *Doe* d. *Dayman* v. *Moore* (2); *Sug.*, Vend. & Pur., p. 480 [14th Ed.]; *Shelford's* Real Property Statutes, p. 175; *Hargrave's Co. Litt.* 270 b. The holding by sufferance merely is not equivalent to the tenancy at will. The Statute extinguishes the title of an Owner absolutely who permits his tenant at will to remain under that tenancy over twenty years, and the tenancy continues throughout that period until destroyed. That was the ruling of the Chief Justice in the Court below, and is conformable to *Doe* d. *Bennett* v. *Turner* (3), *Randall* v. *Stevens* (4), and *Ley* v. *Peter* (5). The allowance by *Day*, Senior, of his Son's continued possession, and his dealing with the property, could not be referred to any new tenancy; as observed by Baron *Martin* in *Pinhorn* v. *Souster* (6); if it could the Statute would not apply, as the holding on in such circumstances, as observed by *Patteson*, J., in *Doe* d. *Dayman* v. *Moore* (7), was unsettled, as the Judges avoided giving an opinion,

(1) 7 M. & W. 226; 9 M. & W. 643.
(2) 9 Q. B. 555.
(3) 7 M. & W. 226.
(4) 2 E. & B. 651.
(5) 3 H. & N. 101.
(6) 8 Ex. 769.
(7) 9 Q. B. 558.

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whether the Statute applied at all. It was established by the evidence at the trial, that in May, 1842, *Day* (the Son) entered into possession of the land in question as tenant at will to *Day* (the Father), and continued such tenant at will until his death in 1864, during all which period *Day* (the Father) never was in possession or receipt of the rents of the land in question, and in fact did not enter into possession until April, 1867. It is clear from the evidence that no tenancy at will between *Day*, Junior, was created at any time subsequent to his first entry on the land in question. In these circumstances there was no misdirection by the Judge, and the jury rightly found for the Appellant. The rule for a new trial ought not to have been granted, and must be discharged.

Mr. *C. E. Pollock*, Q.C., and Mr. *J. Day*, for the Respondents:—

The rule for a new trial was rightly made absolute, as the Chief Justice on the trial misdirected the jury. It appears from the notes of the Judge at the trial that he told the jury that the original tenancy was not determined by the lettings and transfer by *Thomas Day*, Junior, with notice to *Thomas Day*, Senior. If so, there was a waiver by the latter of the forfeiture, which, the Chief Justice stated, was thereby created. The learned Judge also directed the jury that the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, began to operate in and from May, 1843, being the end of the first year of the original tenancy, and could not be defeated except by the creation of another—namely, a new tenancy—and did not tell them that by the lettings and transfer new tenancies at will were created between *Day*, Senior, and the Lessees and transferees respectively, and that such tenancies might be inferred from the conduct of the parties, without any actual agreement between the *Days*, the Father and Son. These were all misdirections in law and fact, and entitled the Respondents to a rule for a new trial. There were two points of law for consideration on the motion for the new trial: first, whether a tenant at will, by underletting any portion of the property held under such tenancy, forfeits his tenancy, or estate, or merely determines his tenancy. The authorities all decide such dealing to be a determination of the tenancy: *Comyn's* Dig., tit. 'Estates,' H. (6), vol. iv., p. 60; *Carpenter* v. *Colins* (1); *Moss*

(1) Yelv. 73.

v. *Gallimore* (1); *Doe* d. *Davies* v. *Thomas* (2); *Pinhorn* v. *Souster* (3); *Melling* v. *Leak* (4); *Locke* v. *Matthews* (5); *Doe* d. *Goody* v. *Carter* (6). Secondly, that there being two sources of a tenancy at will—that is, by agreement, either express or implied—that circumstance ought to have been distinctly pointed out to the jury, and the omission to do so was a misdirection of the jury. The law is clearly laid down as to the nature and extent of a tenancy at will in *Watkins* on Conveyancing, p. 6 [8th Ed.], and *Bythewood* on Conveyancing, by *Jarman*, Vol. v., p. 350 [3rd Ed.]; *Shelford's* Real Prop. Statutes, pp. 165, 172; *Richardson* v. *Langridge* (7); *Birch* v. *Wright* (8). In Copyholds, if a tenancy held at the Will of the Lord by custom of the Manor, and a Copyholder grants a lease without licence of the Lord, it operates as a forfeiture. The cases cited for the Appellant confirm rather than negative these propositions of law. There was clearly, therefore, such a miscarriage of justice as entitled the Respondents to a new trial; and the judgment making the rule absolute for such, ought to be affirmed, and the case sent back to be re-tried.

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July 20.

Judgment was reserved, and now delivered by

SIR JOSEPH NAPIER:—

The appeal in this case has been brought against an Order pronounced on the 1st of September, 1869, in the Supreme Court of *New South Wales*, by which it was ordered that the verdict found for the Plaintiff herein be set aside and a new trial had between the parties. The action was one of ejectment, in which the Plaintiff sought to recover a plot or parcel of ground in the city of *Sydney*, which had formerly belonged to the late *Thomas Day* the elder. His residence, and the premises on which he carried on his business as a Boat-builder, were situate on this property. In the month of May, 1842, he gave over the business and the property to his eldest Son (the late *Thomas Day* the younger), then of age, and went to reside at a place called *Pyrmont* with his family. He had other property in addition to that which he gave over to his Son. *Thomas Day* the younger,

(1) Dougl. 279.
(2) 6 Ex. 854.
(3) 8 Ex. 763.
(4) 16 C. B. 669.
(5) 13 C. B. (N.S.) 753.
(6) 9 Q. B. 863.
(7) 4 Taunt. 128.
(8) 1 T. R. 378.

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having thus been put in possession, as ostensible Owner of this property, and manager of the business of Boat-builder, continued in the occupation from the month of May, 1842, down to the time of his death in December, 1864. He made his Will and devised the property in dispute to his wife for life; she was the Plaintiff in the ejectment. The Defendants claimed under the Will of *Thomas Day* the elder, who, in 1867, procured attornments from the tenants on the property, to whom *Thomas*, the Son, had let portions.

The trial of the ejectment took place before the Chief Justice *Stephen* and a jury in November, 1868. Evidence was given to prove the circumstances under which *Thomas Day* the elder gave up the property in question to his Son *Thomas*, and put him in possession in 1842; to shew the character of his occupation, and what he did in building on the property and letting to tenants; and that these acts and dealings were known to *Thomas Day* the elder, and had his sanction. He did not execute any deed of conveyance to his Son, and consequently it was admitted on both sides that the estate of the latter at the commencement was, in law, a tenancy at will.

The occupation of *Thomas Day* (the Son) having been shewn to have continued without interruption for twenty-two years, after the commencement of the estate at will in May, 1842, it was submitted at the trial on the part of the Defendants that as it appeared on the evidence that at various dates commencing in or about 1852, *Thomas Day* (the Son) let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred, or purported to transfer, part of the land to his Brother *William*, who let and received rent for the same, of which letting and transfer *Thomas Day* (the Father) had notice, at the times at which they took place respectively; and as the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of *Thomas Day* the elder, in the occupation of *Thomas Day* the younger, or of tenants paying rent to him until his death in 1864—"these facts amounted to a determination of the original tenancy at will created in May, 1842, and to the creation of a fresh tenancy, so that the *Statute of Limitations* began to run in favour of *Thomas Day* (the Son) only from such determination."

A nonsuit was called for, but this was refused by the Chief Justice, who, at the close of the evidence on both sides, submitted to the jury certain questions in writing, accompanied by an explanatory charge.

In answer to these questions the jury found that the authority given by the Father to the Son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of the property by the Son were not in violation of the authority given by the Father; that these acts were done with his knowledge and assent, and that no fresh authority was afterwards given.

The jury having returned these answers, were directed by the Chief Justice to find a verdict for the Plaintiff, which they found accordingly.

A rule *nisi* was obtained to have the verdict set aside and a new trial granted. This rule was afterwards made absolute, the Chief Justice dissenting. The majority of the Court held that the jury were misdirected as to the question whether the original tenancy at will was determined by the underletting. One of the two Judges who constituted the majority thought that the jury were not sufficiently instructed, as to implying a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement. The other Judge was of opinion that the verdict was against evidence. He does not state whether this applied to all the answers of the jury or to which in particular.

The material question in this appeal is, whether the occupation of the late *Thomas Day*, the younger, from May, 1842, until December, 1864, was such as to have conferred on him an indefeasible title to the property, so that it passed by his Will to his Widow and devisee. His occupation at the commencement was that of a tenant at will. His Father must be taken to have been the legal owner and proprietor, subject to the tenancy at will. If before and at the time of the death of the Son, the Father's right of entry, or of bringing an action to recover this property, was barred, the Son died seised, and the Plaintiff's title is good.

This depends on the construction and effect of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).

The 2nd Section of the Statute enacts, that no person shall make

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an entry on any land or bring an action to recover it except within twenty years next after the right to make that entry or to bring that action shall have first accrued to him.

A right of entry may be said to exist at all times in him under whom, and at whose will, the occupier holds, for he may enter at any time and determine his will.

But the 7th section enacts that the right of the person entitled, subject to a tenancy at will, to make an entry or bring an action to recover the land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

The reasonable construction of this provision is (according to Lord *St. Leonards*) that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy.

In the present case the right under the Statute must be deemed to have first accrued to *Thomas Day*, the Father, in May, 1843, at which time the tenancy at will under which the occupation began, must, for the purposes of the bar of the Statute, be deemed to have determined. The condition of *Thomas Day*, the Son, was, for these purposes, but that of a tenant at sufferance, from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties.

The Defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied, in order to shew that the original tenancy was so determined, were consistent with the character of the occupation confided to *Thomas*, the Son, and were beneficial to the property. It seems difficult to conclude that acts, which were conformable (not contrary) to his Father's will, which had his sanction, and so far were authorized, not wrongful, should have determined the tenancy at will. It might be more reasonable to regard them as acts of a like character done by a Mortgagor or *cestui que trust* in possession are regarded; that is to say, as impliedly authorized by the character in which, and the circumstances under which, he occupies at will.

It seems to their Lordships that as in this case the Statute began

to run from May 1843, the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at Will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the Statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, when he was already, from the end of the first year, for the purposes of the bar of the Statute—a tenant at sufferance.

Their Lordships, therefore, are of opinion that the defence made at the trial by the Respondents cannot be maintained. They submitted "that the Statute began to run in favour of *Thomas Day*, Junior, only from such determination," *i.e.* the alleged determination of a fresh tenancy by the acts of letting and transfer by *Thomas Day*, the Son, with the knowledge of *Thomas Day*, the Father. Their Lordships are clearly of opinion that the Statute began to run in favour of *Thomas Day*, the Son, in May, 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar.

When the Statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the Statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at Will.

It was contended that there was not only a determination of the original tenancy at Will, but the creation of a fresh tenancy, inasmuch as after such alleged determination, "the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of *Thomas Day*, Senior, in the occupation of *Thomas*

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Day, Junior, or of tenants paying rent to him until his death in December, 1864."

The Chief Justice put the question in writing to the jury whether, with the knowledge of the acts done by *Thomas*, the Son, a new authority to occupy was given by *Thomas*, the Father, and this was answered in the negative; and afterwards he put orally a question to the jury, whether a new tenancy at Will was created by a new authority to occupy, then given, or fresh arrangement made between the parties? This was also answered in the negative by the jury.

Their Lordships cannot concur in the opinion of Mr. Justice *Cheeke*, if he meant to say that both answers were, or that either of them was, contrary to the evidence; nor can they concur in the opinion of Mr. Justice *Hargrave*, that the jury may have been misled by not having been sufficiently instructed as to their power to imply a new tenancy at will from the acts and conduct of the parties without finding an actual agreement.

Assuming that there was a determination of the tenancy, and that the occupation of *Thomas Day*, the Son, continued without interruption, to the knowledge and with the sanction of *Thomas Day*, the Father, this would constitute an occupation at sufferance to all intents, and so far as related to the purposes of the statutory bar no alteration would be made in the *status* of *Thomas*, the son. The right of entry created by the 7th section of the Statute was not thereby waived, suspended, or extinguished; there was no revesting of possession; the running of the Statute was in nowise impeded. Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case.

The express exception in favour of cases within the 14th section of the Act, where there has been a written acknowledgment of the title, shews the pervading purpose of the Legislature in creating the bar under the previous sections. Besides, as stated by Sir *William Erle*, C.J., in *Locke* v. *Matthews* (1), "if the Owner enters effectively, and creates a new tenancy at will, he has twenty-one

(1) 13 C. B. (N.S.) 764.

years from that period before he can forfeit his estate." The language and policy of the Statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will.

The question in effect is, whether the prescribed period has elapsed since the right accrued to make an entry or bring an action to recover the property, where such entry or action might have, but has not, been made or brought within such period. It seems to their Lordships that in this case the prescribed period of limitation elapsed at the end of twenty-one years from the commencement of the tenancy at will; that whether this tenancy was determined by the acts of the parties is not material, inasmuch as there was not a fresh tenancy at will created within this period. They think that the findings of the jury were according to the evidence, and that there was not any misdirection on the part of the Chief Justice, by which the jury could be supposed to have been misled. It is not necessary for their Lordships to review in detail, or further to express an opinion on the positions of law in the elaborate and able judgment of the learned Chief Justice. It is enough to say that, in the opinion of their Lordships, there was not any misdirection upon any material point; that the findings of the jury were warranted by the evidence, and that the verdict for the Plaintiff is a right verdict, and ought not to be set aside.

They will, therefore, humbly recommend Her Majesty that this appeal be allowed; that the Order of the Supreme Court of *New South Wales*, by which the verdict was ordered to be set aside and a new trial had, be annulled; the rule *nisi* be discharged with costs; and the postea delivered to the Plaintiff to enter judgment on the verdict.

The Appellants to have the costs of this appeal.

Solicitors for the Appellants: *Walker & Jerwood.*
Solicitors for the Respondents: *Parker & Clarke.*

J. C.* 1871 July 17.

HENRY BULKELEY AND ROBERT FLEMING APPELLANTS;

AND

HENRY GERARD SCHUTZ AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Foreign Railway Company—Companies Act, 1862—*Joint Stock Companies Acts*, 1856, 1857—*Limited liability—Jurisdiction—Consular Court in Egypt.*

A Railway Company and partnership complete and existing in a Foreign Country is not within the purview of the English *Joint Stock Companies Acts*, 1856, 1857, so as to enable H.B. Majesty's Consular Court in *Egypt* to issue a sequestration against such of the members of the Company as were resident within the jurisdiction of that Court, for not complying with an Order of that Court to register the Company as one of limited liability under the English Acts.

THIS appeal was brought from an Order of the Supreme Consular Court of *Constantinople*, reversing an Order of the Consular Court of *Egypt*, held at *Alexandria*, whereby a sequestration levied by the Respondents upon the property of the Appellants, as representing the *Alexandria and Ramlé Railway Company*, was set aside.

The facts were these:—

The Appellants were the only Members of the Committee of the *Ramlé Railway Company* who were resident within and subject to the jurisdiction of Her Britannic Majesty's Consular Court in *Egypt*, and the Respondents were holders of shares in that Company.

The *Ramlé Railway Company* was formed in April, 1862, under Local Statutes which, amongst other things, contained the following provisions:—

I. "A Company is formed amongst the parties who sign this contract or agreement, or who may at any time find themselves possessors of one or more shares, having for its objects the formation of a line of Railway and Telegraph between *Alexandria* and *Ramlé*, under the terms and conditions stated in the present Statutes, in the

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

contract of *M. Fairman*, and in the concession of H.H. the Viceroy, to all of which the Shareholders (Partners) agree, accepting the contents and consequences without exception or modification of any kind."

"VI. The Shareholders are only liable for the total amount of the shares for which they have subscribed."

"XXXII. The Company is constituted under the jurisdiction of Her Majesty's Consulate."

At the time of the formation of the Company the English Joint Stock Companies Acts, 1856 and 1857, were in operation.

The Respondents purchased shares in, and duly became members of, the Company.

On the 21st of February, 1867, the Respondents brought a suit against the Appellants in Her Britannic Majesty's Consular Court in *Egypt*, held at *Alexandria*, which prayed that the agreement so made and entered into as aforesaid, for the formation of a Company with limited liability, be specifically performed by the Appellants, the Respondents being willing, and thereby offering, to perform the same as far as it remained on their part to be performed; and that the Company so to be formed might be registered as a Company with limited liability, in accordance with the provisions of the Joint Stock Companies Acts, and duly incorporated according to law.

Upon the 11th of August, 1866, judgment was given in the suit, and it was ordered that the Company should, within six months, be formed into a Company with limited liability. Against the above Order the Appellants appealed to the Supreme Consular Court at *Constantinople;* and on the 31st of December, 1867, an Order was made by the Supreme Consular Court dismissing the appeal.

An Order was afterwards made by the Supreme Consular Court granting leave to the Appellants to appeal to Her Majesty in Council, and staying execution pending such appeal.

On the 27th of October, 1868, the Respondents finding that the Appellants had not prosecuted the appeal, obtained from the Consular Court at *Alexandria* an Order that the Defendants should, within ten days, register the Company as a limited Company, and that in default thereof a sequestration should issue. On the 10th of November, 1868, the Appellants not having registered the Com-

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pany as directed by the above Order, a warrant for sequestration was lodged by the Respondents, and an order for sequestration issued by the Court, and a sequestration accordingly levied on the *Alexandria and Ramlé Railway*. Upon the 18th of November, 1868, the Appellants obtained from the Consular Court at *Alexandria* an Order for an extension of three months' time for the registration of the Company, and that in the meanwhile the sequestration should be suspended.

A general meeting of the Shareholders of the Company was soon after duly held, as required by cl. 4 of the 179th section of the *Joint Stock Companies Act*, 1862, and their assent was obtained to the registration of the Company as a limited Company, as required by that clause.

Upon the 4th of February, 1869, the Respondents, upon the affidavit of the Respondent, *Robert Fleming*, and the exhibits thereto annexed, obtained a rule calling upon the Appellants to shew cause why the writ of sequestration should not be set aside. And on the 6th of April, 1869, the rule was made absolute, and it was ordered that the writ of sequestration should be set aside. The Respondents obtained leave to appeal from the above Order to the Supreme Consular Court at *Constantinople*. On the 5th of October, 1869, the appeal having been argued, an Order was made by the Supreme Consular Court, reversing the above Order of the Consular Court of *Alexandria*, and reimposing the sequestration which had been raised, upon the following grounds, as stated by the Judge:—"The partnership called the *Ramlé Railway Company* is, by the terms of the contract, and the consent of the local Government, subject to the jurisdiction of the British Court, but without being so constituted according to the English law as to carry out the original contract of partnership. Under these circumstances, I ordered the Respondents, when I was sitting in the Court below, to take the necessary steps to put the partnership, by registration, in a safe and legal position as a Company with limited liability. The Defendants in the Court below, Messrs. *Fleming* and *Bulkeley*, the English Managers and Directors of the business, allege that they have done all they could, having obtained the sanction of their co-partners with a view to carry out my Order, and to put the partnership on a legal footing. But, I am of opinion, that they

have done no such thing. They report that the Registrar refused to register the 'existing Company,' and, evidently, he was right in so refusing. But the proper steps to have taken to effect the object in view would have been not to ask that the existing Company should be registered, but that the partnership, a body of persons who have subscribed capital on certain conditions, should be formed into and registered as a 'limited Company.' It is said that the original 'Company' must have been wound up for this purpose. But it was not a company, nor was winding up necessary. The only difficulty is with respect to an Office in *London*. This does not seem an insuperable difficulty, as other Companies, though carrying on business abroad, keep an office in *London*."

The Appellants presented a petition to Her Majesty in Council for leave to appeal, not only from the Order of the 5th of October, 1869, but also from the Order of the 31st of December, 1867; and on the 5th of February, 1870, leave was given to the Appellants to prosecute the appeal from the Order of the 31st of December, 1867, in conjunction with their appeal from the Order of the 5th of October, 1869. This Order in Council was afterwards reversed with costs, as it contained mis-statements of fact (1), and a further petition for leave to appeal from the Order of the 31st of December, 1867, and to prosecute the same in conjunction with the appeal from the Order of the 5th of October, 1869, was also refused.

The present appeal was confined to the Order of the Supreme Court, dated the 5th of October, 1869.

The *Solicitor-General* (Sir *John D. Coleridge*), and Mr. *Westlake*, for the Appellants:—

The Appellants, who have been proceeded against as the *Alexandria and Ramlé Railway Company*, had no power to comply with the demand of the Respondents to register the Company under the English *Companies Act*, 1862, 25 & 26 Vict. c. 89, and so to make it one of limited liability. That Act does not apply to a Company formed in a Foreign dependency of the English Crown, or to the *Alexandria and Ramlé Railway Company*—and the Appellants were not bound, if they had the power, to comply with the Order of the Consular Court of the 11th of August, 1866, to form the *Alexandria and*

(1) *Ante*, p. 196.

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Ramlé Railway Company into a Company with limited liability. By the 6th Article of the Statute constituting the Company, the Shareholders are only liable for the total amount of the shares for which they have subscribed. The learned Judge of the Consular Court construes this as an agreement to place the Company, or, as he terms it, "the partnership," on a footing of limited liability, and he says, "whatever may be supposed to be the difficulty of making the partnership a limited Company, it was certainly intended and agreed upon so to be made." But the Appellants being willing as far as possible to obey the Order of the Consular Court of the 11th of August, 1866, obtained from that Court an extension of three months' time for the registration of the Company, with a temporary removal of the sequestration, and it appears that they, in conjunction with the other members of the Company, summoned a general meeting of the Company for the purpose of its assenting to a registration of the Company in *England*, under the *Companies Act*, 1862. Such assent was given in pursuance of sect. 179, cl. 4, of that Act; but when the Appellants applied to the Registrar of Joint Stock Companies in *England* preliminary objections were taken, as the Appellants could not comply with the 186th section of the Act, and the Registrar refused to register the Company.

THEIR LORDSHIPS here intimated their wish to hear the other side.

Mr. *Butt*, Q.C., and Mr. *Lanyon*, for the Respondents:—

At the time of the formation of the *Alexandria and Ramlé Railway Company* the *Joint Stock Companies Acts* of 1856 and 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14) were in operation. By the 6th of the Statute of the Company, the Company was to be a limited liability Company, the Shareholders subscribed upon the faith of that condition, and there was nothing, as appeared from the evidence, to prevent the Company being registered as a partnership Company with limited liability. The Appellants took no steps for the purpose, and the result was, that each Shareholder became liable to be sued for the whole debts of the Company. The Shareholders at the meeting convened by the Respondents gave authority to register the Company, and it was their bounden duty so to do.

Judgment was delivered by

THE LORD JUSTICE JAMES:—

It appears to their Lordships, that in this case the sequestration ought not to have issued. In the first place, the suit was not against the Company, the suit was against two persons as representing the Company, and it is difficult to understand how the sequestration could issue against a Company in a suit in which the Company really were not parties, or how a sequestration could issue as a mode of attachment for contempt against a Joint Stock Company that was not a Corporation? But assuming, that in truth, the Company were before the Court originally, that they were represented before the Court (as the Appellants themselves seem to have imagined they were represented) by two of the Committee for the purpose of properly determining what the Company ought to do; and assuming that the Order could be treated as an Order binding the Company, their Lordships are of opinion that what the Company was ordered to do, and for the not doing of which their property has been sequestrated, was a thing which they could not do. They were told that they ought to have taken steps to register themselves as an English Company under the *Companies Act*, 1862. Their Lordships are clearly of opinion, that Act never contemplated that a Foreign partnership, actually complete and existing in a Foreign Country, could be brought within the purview of the English Act of Parliament, the English Legislature having no power over the Shareholders of such a Company. The only mode in which they could have done it would have been, not to register themselves as a Company, which was the only thing they could do honestly towards their Shareholders, or literally to comply with the Order, but to have gone through the form of dissolving the Company and of forming a new Company altogether, which is a totally different thing. No doubt the original Order is not now open to question before their Lordships; but that Order is really only an Order against the two Defendants, and the order to register is an Order on the two Defendants to register the Company. These two Defendants and the Company have done all that they can to comply with that Order, and they cannot be subject to sequestration because they have

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been ordered to do something which by law it is impossible for them to do.

Their Lordships will, therefore, humbly recommend Her Majesty that this appeal be allowed with costs, that the Order of the Supreme Consular Court at *Constantinople* ought to be reversed, and that an Order be substituted for it, dismissing the appeal to the Supreme Consular Court, with costs, and affirming the Order of the Consular Court at *Alexandria*.

Solicitors for the Appellants: *W. & H. P. Sharp.*
Solicitor for the Respondents: *T. R. Kent.*

END OF VOL. III.

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BAILMENT.] A bailment on trust implies that there is reserved to the Bailor the right to claim a re-delivery of the property deposited in bailment.—Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment.—Where, therefore, Corn was deposited by Farmers with a Miller, to be stored and used as part of the current consumable stock or capital of the Miller's trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the Farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of an equal quantity, on the day on which he made his demand, with a small charge for general purposes: —*Held*, that such a transaction amounted to a sale by the Farmer to the Miller, and was not a bailment of the corn, and entitled the Miller to claim in respect thereof upon a Policy of Insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the Policy, as "goods held in trust and on commission," upon which condition the claim was resisted by the Insurers. THE SOUTH AUSTRALIAN INSURANCE COMPANY *v.* RANDELL - - 101

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BANKRUPTCY.] A member of a Firm carrying on business in *London* and *Hong Kong*, sent from *London* a power of attorney to his Partners in *Hong Kong*, enabling them to petition the Court at *Hong Kong* for an adjudication of Bankruptcy, or to make an assignment of all their estate in trust for Creditors. Under this authority they petitioned the Court, which was, by the law of Bankruptcy in force there, in itself an act of Bankruptcy; and they also assigned the property of the firm to a Trustee, which was also an act of Bankruptcy by that law. About the same time a Partner of the Firm resident in *London* was adjudicated Bankrupt there, and a joint adjudication passed in *Hong Kong* against all the Partners, the latter being subsequent in date to the former:—*Held*, that it was not competent to the Partner in *London* to dispute the validity of the joint adjudication.—*Semble*, a separate adjudication in *England* against the English resident partner of a *Hong Kong* firm, is no ground for refusing in *Hong Kong* a joint adjudication against all the Partners, though one is not resident in the Colony. Lyall *v.* Jardine - - - 318

BARRISTER: *See* Colonial Bar.

BENGAL LETTERS PATENT.] A cause having been heard before a single Judge of the High Court, and a decree made by him dismissing the suit, an appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it ought to be affirmed; and, under the 36th section of the Letters Patent creating the High Court, a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing any opinion, whether the 36th section was applicable, having regard to the 26th rule of the High Court, directed the appeal to be heard on the merits. Miller *v.* Barlow - 733

BILL OF EXCHANGE.] The *Bank of Van Diemen's Land* were Indorsers of a Bill drawn by *G.* on *G. & Co.* at *Melbourne* at fifteen days after sight. The Bill was transmitted by the *Bank of Van Diemen's Land* to the *Bank of Victoria*, their Agents at *Melbourne*, for presentment. The *Bank of Victoria* received the Bill at one o'clock on Friday, and at two o'clock on the same day the Bill was presented by their Clerk to the Drawees, *G. & Co.*, for acceptance, and left with them for that purpose. On Saturday, the following day, an acceptance was written by one of the Firm of *G. & Co.* across the face of the Bill, and the Bill so accepted was handed to a Clerk to be delivered in the usual course of business, and at half-past 11 o'clock on that day a Clerk of the *Bank of Victoria* called upon the Drawees and asked for the Bill. He was told by the Clerk of the Drawees that the Bill had been mislaid, and requested to call again on Monday, which he agreed to do, as according to the custom in *Melbourne* business closed at 12 o'clock on Saturdays. On Monday the Clerk of the *Bank of Victoria* called again upon the Drawees, and was told that the Bill was ready to be delivered, but that in the absence of the Clerk who had charge of it, it

BILL OF EXCHANGE—*continued.*

could not then be got at, and he was requested to call on Tuesday. The Clerk called on that day and obtained the Bill, but the acceptance of the Drawees was cancelled on the face of the Bill, the Drawees having obtained information in the interval that the remittance was not likely to be forwarded by *G.* to meet the Bill. *G.* became insolvent, and the *Bank of Van Diemen's Land* having received nothing in respect of the Bill, brought an action against the *Bank of Victoria*, as their Agents, for negligence. The evidence did not show any uniform usage at *Melbourne* to present Bills the same day for acceptance. The custom to close at 12 o'clock on Saturdays was proved. The Judge put it to the jury, whether they thought that the *Bank of Victoria* was guilty of negligence or a breach of duty, in not demanding that the Bill should be delivered up on Saturday accepted or unaccepted, and the jury answered that, strictly speaking, there was a neglect, but considering the respectability of the Drawees, and Saturday being a short day, the *Bank of Victoria* was excusable in leaving the Bill. The jury found for the Plaintiffs with nominal damages, and an application by the Plaintiffs to increase the damages to £3,000, the amount of the Bill, was refused by the Supreme Court:—*Held*, by the Judicial Committee (affirming that judgment), that in the circumstances, and considering the position of the Drawees, there was no such negligence by the Defendants as Agents as to entitle the Plaintiffs to substantial damages.—*Held*, further, that although the Judge was wrong in directing the jury on what was a matter of law and not fact, yet that the substance of the answer of the jury was, that it being the ordinary course to leave a Bill for acceptance for twenty-four hours, and that the twenty-four hours run out on Saturday, but not before 12 o'clock, it was an excusable neglect to postpone the demand for an answer until the opening of the Drawee's Counting House on Monday. The duty of an Agent is to be measured by considerations arising in particular cases; his duty is to obtain acceptance of the Bill, and it may be prudent, in circumstances, from the respectability of the Drawee, not to press for acceptance in such a way as to lead to a refusal, providing that proper steps are taken within the limit of time which will preserve the rights of his Principal against the Drawee. The Bank of Van Diemen's Land *v.* The Bank of Victoria - - - 526

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BISHOPRIC, COLONIAL: *See* Colonial Church.

BOTTOMRY BOND.] Before resorting to Bottomry for raising necessary supplies, it is absolutely necessary (where practical) that notice should be given by the Master to the Owner of the Vessel, and an allegation that such Owner was Insolvent, is no excuse for not communicating to him, unless he has been judicially declared Insolvent, and the ownership of the Vessel vested in his Assignees, to whom such notice must then be given.—*Semble*:—Notice to the Mortgagee of the Vessel in such circumstances, would not suffice. The "Panama" [199

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COLONIAL BAR.] Whether an appeal lies to the Queen in Council against a judgment of the Court of Queen's Bench in *Lower Canada*, quashing a writ of Error against an Order of the Court of Queen's Bench on the Crown side, fining and ordering an attachment against a Counsel for an alleged contempt of Court—*quære*.—*Semble*, where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee, under the Statute, 3 & 4 Will. 4, c. 41, s. 4.—A Judge of the Court of Queen's Bench in *Lower Canada*, whilst sitting alone in the exercise of the Criminal jurisdiction, has, under the authority conferred on him by sect. 72 of ch. 77 of the Consolidated Statutes of *Canada*, no power to pronounce a Counsel in contempt for publishing two Letters reflecting upon the conduct of such Judge, or to impose a fine *In re* Ramsay. - - 427

COLONIAL CHURCH.] In 1847, the Colony of the *Cape of Good Hope*, with its dependencies, was erected into a Bishop's See and Diocese, to be called the "Bishopric of *Cape Town*," and the Appellant was appointed and consecrated Bishop thereof. By the Letters Patent the Bishop was constituted a body corporate, with power to hold and enjoy land and hereditaments of what nature or kind soever; and he was further empowered to resign the office of Bishop of *Cape Town*, without prejudice to any responsibility to which he might be liable, in law or equity, in respect of his conduct in his office. In 1850, a grant was made, in the name and on behalf of Her Majesty, of a piece of land in the Town of *Pietermaritzburg* and

COLONIAL CHURCH—*continued.*

district of *Natal*, in the Colony, to the Appellant and his successors, in trust for the English Church. In October, 1853, the Appellant, in pursuance of the power given him in his Letters Patent, resigned the office and dignity of Bishop of *Cape Town*. In November, 1853, Letters Patent were issued for erecting the district of *Natal* into a separate See or Diocese, subject and subordinate, with the See of *Graham's Town*, thereby also created a separate See, to the Metropolitan See of *Cape Town*; and the Respondent was appointed Bishop of *Natal*. The Respondent was, as in the original Letters Patent creating the Appellant Bishop of *Cape Town*, constituted a Corporation sole, with the like power to hold and enjoy lands, and the Church then building on the ground granted in 1850, was declared to be thenceforth the Cathedral Church and See of the Respondent as such Bishop of *Natal*. In December, 1853, the Appellant was appointed by Letters Patent, Bishop of the See of *Cape Town*, and Metropolitan of the *Cape of Good Hope*, with the same corporate character and capacity as had been before conferred on him by the Letters Patent of 1847. Soon after the Respondent's consecration, the Appellant appointed him by power of Attorney to act as Trustee of certain lands and Churches in the Colony and See of *Natal*, including the land and Cathedral Church thereon in the City of *Pietermaritzburg*, granted in 1850, and which had then been entered on the Colonial register in the name of the Appellant. In 1864, the Appellant revoked this power of Attorney. In consequence of this and other proceedings taken at the instance of the Appellant to prevent the Respondent from having the free use of the Cathedral Church at *Pietermaritzburg*, the Respondent brought an action of ejectment against the Appellant for possession of the land and Church, claiming nominal damages, and for the substitution of his own for the Appellant's name as Trustee thereof. The Supreme Court gave judgment in favour of the Respondent, and decreed the land and the buildings thereon to stand vested in the Respondent and his successors, as Bishops of *Natal*.—On appeal, *Held*, by the Judicial Committee, first, that though the suit was not properly framed so as to allow the substitution of the Respondent as Trustee in the place of the Appellant, yet, that, having regard to the terms of the grant, and the successive Letters Patent appointing the Appellant and Respondent respectively Bishops of *Cape Town* and *Natal*, and that the Respondent's Patent was subsequent to the Appellant's resignation, but prior to his second Patent as Metropolitan; the Appellant had ceased on such resignation to be a Trustee of the land and Cathedral Church, or to have any estate or right to interfere with the Respondent's free access to and use of such Church; and—Second, that it was competent to the Crown at the date of the Letters Patent to the Respondent, to "Ordain and declare that the Church in the City of *Pietermaritzburg* should thenceforth be the Cathedral Church and See of the Respondent and his successors, Bishops of *Natal*;" and the decree of the Court below varied by its being declared, that the Respondent, as Bishop of *Natal*, shonld have free

COLONIAL CHURCH—*continued.*

and uninterrupted access to the land and premises in the grant of 1850 for the purpose of enjoying and exercising all rights, privileges, and immunities, which had hitherto been enjoyed and exercised, or ought to be enjoyed and exercised, by the Bishop of *Natal* as such Bishop or otherwise, in reference to or within the Cathedral thereon, and its appurtenances; and that the Appellant, the Bishop of *Cape Town*, and his Agents, be restrained from in any manner interfering with such access, enjoyment, or exercise; saving, however, to any, except the Appellant, any rights in reference to the Cathedral Church as they also enjoyed. THE BISHOP OF CAPE TOWN *v.* THE BISHOP OF NATAL - - - - 1

COLONIAL LAW.] 1. The *Canadian Act*, 14 & 15 Vict. c. 51, consolidating and regulating the general clauses relating to Railways, enacts by sect. 19, cl. 1, that "each shareholder shall be individually liable to the Creditors of the Company, to an amount equal to the amount unpaid on the Stock held by him, for the debts and liabilities thereof, and until the whole amount of his Stock shall have been paid up; but shall not be liable to an action therefor before an execution against the Company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such Shareholders."—Article 1,187 of the Civil Code of *Lower Canada*, tit. "Obligations," sect. V., provides that, "when two persons are mutually Debtor and Creditor of each other, both debts are extinguished by compensation which takes place between them," and Article 1,188 declares, that "compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality."—*A.*, a holder of Stock in a Railway Company in *Lower Canada*, of which Company he was President at a specified salary, paid up his shares to a certain amount, and as far as calls were made by the Company. *B.*, a judgment Creditor of the Company, sued *A.*, under the Act, 14 & 15 Vict. c. 51, in his character of a Shareholder of the Company, for the amount of his Stock unpaid. *A.* pleaded in defence, compensation under the 1,187th and 1,188th Articles of the above Code, the Company being indebted to him for salary as President to an amount exceeding the sum due on the unpaid Stock, which he insisted operated as an extinguishment by compensation. The Court of Queen's Bench in *Lower Canada* were of opinion, that compensation had taken place under the above Articles of the Civil Code. Upon appeal:—*Held* by the Judicial Committee (reversing such judgment), that, as no calls in respect of the unpaid Stock held by *A.* had been made, as provided by sect. 16. cl. 10, of the above Act, the provisions of Articles 1,187 and 1,188 of the Civil Code did not apply, and that compensation had not taken place between *A.* as a Shareholder and *B.*, as judgment Creditor of the Company. RYLAND *v.* DELISLE - - 17

2. ——. In proceeding by writ of Foreign attachment, under the *Victoria Common Law Procedure Act* (28 Vict. No. 274, s. 215), against a Garnishee who has parted with property that had been attached, it is essential that the property should actually, and not constructively, belong to the Defendant in the action; and being satisfied of that fact, the granting an issue to try the question of property, or making an Order against the Garnishee in respect thereof, is a matter for the discretion of the Court. WILSON *v.* TRAIL 33

3. —— Action by the Owner of a Mill against the owner of lands situate above the Mill in which, or over which, part of the water that supplied the Mill arose and flowed, for diversion and subtraction of such water. The Plaintiff claimed under grants and certain Regulations and Ordinances made by the Governor and Council of the Colony of the *Cape of Good Hope*, as well as upon a right of servitude by prescription. Judgment was given, with damages, for the Plaintiff. On appeal such judgment affirmed, the Judicial Committee being of opinion that, whether the power to legislate respecting the water-rights of the lands in which the water arose, or over which it flowed, had or had not been sufficiently reserved in the original grants by the Governor and Council to the then Owners, yet that it was abundantly shewn, that the Legislature of the Colony had exercised authority, by Regulations and Ordinances, over the water in question, by which the derivative rights of the Plaintiff in the Court below had been regulated and declared.—*Semble*, that by the Roman-Dutch Law, as by the Law of *England*, the rights of the lower Proprietors would not attach upon water which flowed beyond the Defendants' land in a known and definite channel, even if it had its source within that land. VAN BREDA *v.* SILBERBAUER - - - 84

4. —— By the law of *Jersey*, a Testator who dies leaving a Widow and lawful child or children cannot dispose by Will of more than one third part of his personal estate. If the Will professes to dispose of more than one-third part of the moveables, it is liable to be reduced *ad legitimum modum*.—By the same law and custom, the Executors of a Testator are entitled to the possession of the whole of the moveables of a Testator for a year and a day after his decease, and their possession continues until they have received the amount of the moveable estate bequeathed by the Will, and have also fulfilled the duties of administration. But at the beginning of their office they are bound to make an inventory of the whole of the moveables, and to cite the heir for the purpose of seeing this done, unless the heir elect to pay or secure to the Executors the full amount of the bequests, debts, and expenses, in which case the heir becomes entitled to the possession.—Under the maxim "*le mort saisit le vif*," the children or heirs of a Testator are, from the moment of his death, the true Owners of that part of the moveable estate which by law belongs to them, but the law of *Jersey* makes the Executors *les procureurs légaux* of the heir, which procuration is irrevocable *jusqu'à l'accomplissement du Testament*, and in this character gives the Executors full right and title, *deux mêmes*, to take possession of, recover, and receive, the whole of the moveables for the purposes of administration, subject to the right of the heir to interpose and demand posses-

COLONIAL LAW—*continued.*

sion from the Executors, by depositing with them the full amount of the debts and other charges of administration, and of the bequests made by the Will. So *held* by the Judicial Committee in a case where a Testator domiciled in *Jersey*, but having moveable estate out of the Island, by his Will bequeathed all his personal property, with the exception of a few trifling legacies, to his Grandson, to the exclusion of his only Son and heir, who claimed to be entitled by the law and custom of the Island absolutely to two thirds, and disputed the right of the Executors to recover or administer more than one third of the Testator's estate. La Cloche *v.* La Cloche - - 125

5. —— No appeal lies in a case of *certiorari* from the Superior Court to the Court of Queen's Bench in *Lower Canada;* so *held* by the Judicial Committee, confirming a judgment of that Court, on an appeal from the judgment of the Superior Court quashing a writ of *certiorari* issued out of the Superior Court, to remove into it certain proceedings of the Seigniorial Revising Commissioners, in which they had disallowed a claim for compensation for the loss of seigniorial rights.—Chap. 88, s. 17, of the consolidated Statutes of *Lower Canada*, expressly excepts cases of *certiorari* granted by the Superior Court from appeal, and is not included in the general terms of s. 23 of c. 77, providing for the allowance of appeals from the Superior Court to the Court of Queen's Bench. Boston *v.* Lelièvre - - - - 157

6. —— By the *Australian Act*, the 22 & 23 Vict. 1859, entitled "An Act to regulate and provide the management of the *South Australian Branch* of the *National Bank of Australasia*, and for other purposes," that Bank is, by sect. 6, constituted a Bank of issue, with all such powers as are usual for establishments carrying on the business of Banking, and by sect. 7 such Bank is empowered to take and hold for reimbursement only, not for profit, freehold and leasehold lands, houses, &c., in satisfaction of any debt due to the Bank, or security for any liability previously incurred, but not in anticipation of such, and to sell and dispose of the same: provided, that it should not be lawful for the Bank to advance or lend money upon the security of lands, houses, &c.—*A.*, who had an account with the Bank in 1861, obtained leave to overdraw to the extent of £10,000 on the security of the deposit of certain title deeds respecting lands; having, however, in 1866, overdrawn to an amount exceeding £13,000, the Bank brought an action against him for that amount, and recovered judgment, but agreed not to enforce such judgment, in consideration that the title deeds so deposited were to remain as security for the money then due, for which judgment was, after the approaching harvest, to be signed, and the land sold for the liquidation of such debt. Judgment was accordingly signed; but before the lands were sold *A.* was declared Insolvent, and the Bank, under the provisions of the *Colonial Insolvent Act* of 1860, required the Assignees to whom the title deeds were delivered to sell the lands, which they accordingly did, and paid the proceeds of the sale into Court. To a bill filed by the Bank against the Assignees, claiming the benefit of these securities, and for the proceeds of

COLONIAL LAW—*continued.*

the sale, the Assignees put in a general demurrer on the ground, that the title deeds were deposited for future advances to be made by the Bank, contrary to the provisions of the Act, 22 & 23 Vict., 1859. The demurrer was allowed by the Supreme Court in *South Australia:—Held*, on appeal, by the Judicial Committee, that there being in 1866 a valid subsisting debt between the Bank and *A.*, the agreement then made was within the enabling part of the 7th section of the Act, and the demurrer overruled. The National Bank of Australasia *v.* Cherry - - - 299

7. —— A Testator bequeathed all his real and personal estate in the Island of *Jamaica*, after payment of debts and legacies, to the Respondents, his Grandchildren, to be apportioned when they should attain the age of twenty-one years, and appointed *D. R.* Executor and Guardian. The Testator died in 1832, and *D. R.* entered into possession of the real and personal estate, and carried on the Testator's trade. An account of the Testator's estate was taken by *D. R.* in 1841, but not finally closed. *D. R.* died in 1850, and appointed the Appellant his Executor. The Respondents had all attained the age of twenty-one years in 1865, and in that year the Appellant, who was the Executor of *D. R.*, filed a cause petition under the Island Statute, 15 Vict. c. 16, in the Court of Chancery in *Jamaica*, for an account of the real and personal estate of the original Testator:—*Held*, that the Appellant was entitled, notwithstanding the delay, as a matter of right, to have an account taken of the personal estate of the Testator, and inasmuch as *D. R.* had been appointed Guardian of the infants, and had entered into possession of the real estate, accounts should also be taken of the rents and profits of the real estate of the Testator. Smith *v.* O'Grady [311

8. —— *Semble* a separate adjudication in *England* against an English resident Partner of a *Hong Kong* Firm, is no ground for refusing in *Hong Kong* a joint adjudication against all the Partners, though one is not resident in the Colony. Lyall *v.* Jardine - - - - 318

9. —— By the French Law prevailing in *Lower Canada* a Certificate of a Notary Public in the Province of *Lower Canada* is sufficient evidence in the Courts of that Province of the due execution of the instrument referred to in the Certificate, and identity of the parties thereto; but the Certificate of a Notary Public in *Upper Canada*, where the English Law prevails, will not be received in the Courts in *Lower Canada per se* as proof of due execution of an instrument, or of the identity of the parties; such fact must be established by evidence, as required by English Law.—In a petitory action brought in the Superior Court in *Lower Canada* to recover land in that Province, the material evidence of title of the Plaintiff consisted of a deed of sale by a Devisee, whose Husband's christian name, as it was alleged, was wrongly described in the Will of the Testator. The deed of sale was executed under a power of attorney, and the only evidence of the identity of the parties was the Certificate of a Notary Public in *Upper Canada* that such power was executed before him by the Devisee and her

COLONIAL LAW—*continued.*

Husband. The Courts in *Lower Canada* refused to give effect to the Certificate in the absence of proof of identity of the parties named therein, and dismissed the Plaintiff's action. On appeal, the Judicial Committee affirmed this decision on the ground, (1), of the absence of evidence of identity of the parties executing the power of attorney, as being those described in the Will of the Testator; and, (2), that the same weight of evidence in a Court governed by the Law of *France* could not be given to the Certificate of an English Notary Public as to a Certificate of a French Notary Public. NYE *v.* MACDONALD **331**

10. —— By the 24th section of the *Cape of Good Hope* Customs Ordinance, No. 6, of 1853, it is enacted, that no goods shall be laden or unladen from any Ship in that Colony until due entry shall have been made of such goods and warrants granted for the unlading of the goods. By sect. 25 it is provided, that the person entering any goods shall deliver to the Collector a Bill of entry thereof, containing, amongst other things, the particulars of the quality and quantity of the goods and the packages containing the same. And by sect. 50 it is enacted, that "every person who shall assist or be otherwise concerned in the unshipping, landing, or removal or the harbouring of such goods" shall be liable to forfeiture, or in a penalty of the treble value thereof.—*P.* and *M.* were members of a Firm carrying on business at *Cape Town*, where *M.* acted for the Firm. *P.*, when in *England*, consigned to *M* at *Cape Town* twenty-five cases of Glassware, and three cases, each of which contained a Carriage, and filled up the cases with Corks, which were liable to duty. When the goods arrived at *Cape Town M.* made out one entry for three cases containing the Carriages and twenty-five cases of Glassware; but made no entry in respect of the Corks. In actions for penalties by the Customs' authorities, *held*, on appeal, by the Judicial Committee, reversing the judgments of the Supreme Court of the *Cape of Good Hope*:—First, that by the 24th and 25th sections of the above Ordinance it was the duty of any person who applies to enter goods for the purpose of having them unladen, to state the particulars of the quality and quantity of the packages the unlading of which he asks for, and that by the omission in the entry by *M.* of the whole of the contents of the three cases containing the Corks, such cases were forfeited, it being an invalid entry of all the goods;—Secondly, as under the Ordinance an entry of goods may be valid though the same Bill of entry contains an invalid entry of other goods, therefore, that the cases containing the Glassware were not forfeited;—Thirdly, that *P.* and *M.* as owners of the goods were liable to the treble penalties imposed by sect. 50, as *M.* was guilty of assisting or being "otherwise concerned" in the unshipping of the goods within the meaning of that section; and Fourthly, that a fraudulent intention is not necessary to be proved to render a person liable to penalties under sect. 50. GRAHAM *v.* POCOCK **345**

11. —— The 6th section of the *Placaat* of the Emperor *Charles* V., of the 4th October, 1540, postponing the claims of Wives under Marriage

COLONIAL LAW—*continued.*

Settlements, until the claims of Creditors of the Husband are satisfied, formed part of the Roman-Dutch Law, which was introduced by the Dutch Colonists on the settlement of the *Cape of Good Hope* in the year 1650, and is still in force in the Colony, unaffected by the Colonial Insolvent Ordinance, No. 6, of 1843.—*P.*, a Merchant domiciled in *England*, a member of a Firm in the *Cape of Good Hope*, executed in *England* a settlement on his marriage with an English woman, whereby he covenanted to pay the Trustees of the Settlement the sum of £13,000 for his Wife's benefit, and to secure the same by a mortgage on his real estate in that Colony. At the time of the Settlement *P.* was perfectly solvent. The Settlement was not registered in the Colony. *P.* afterwards went to the *Cape*, and by a Bond hypothecated his real estate there to his Wife to secure the sum of £13,000 in satisfaction of the Settlement. This Bond was registered in the Colony. *P.* also, while there, remitted a sum of £7000 to the Trustees on account of the sum of £13,000 secured by the Settlement. *P.'s* Firm at the *Cape* was some time afterwards adjudicated, in that Colony, Bankrupts, and *P.* was also made a Bankrupt in respect to his separate estate:—*Held*, first, that as the 6th section of the *Placaat* of *Charles* V. was part of the law in force in the *Cape of Good Hope*, it postponed the claim of *P.'s* Wife under the Settlement until his Creditors were paid.—Second, that although the Settlement was made in *England*, the domicile of *P.* and his Wife, yet that the *Placaat*, being a rule governing the distribution of the assets of the Bankrupt, prevailed in the Colony, as the provisions of the 6th section did not limit it to Marriage Settlements by Dutch Law, so as to exempt Settlements by English Law. The rule being that in a distribution of assets in a *concursus* of Creditors, the order of distribution is a matter for the *lex fori* where the distribution takes place.—*Held*, further, that under sects. 34 and 36 of the *Cape* Insolvency Ordinance, No. 6, of 1843, the provisions of sect. 6 of the *Placaat* did not apply so as to postpone the claim of the Wife of *P.* to the Creditors of the joint estate of the Firm, but only to the separate estate of *P.*—The Court below—in a claim for reconvention by the Assignees of *P.* against the Trustees of the Settlement—held that the payment of the £7000 was an undue preference in contemplation of Bankruptcy, within the meaning of the 84th section of the *Cape* Insolvent Ordinance of 1843. On appeal such holding reversed. THURBURN *v.* STEWARD - - - - - **478**

12. —— The *Australian Act*, No. 4, of 1855–6, entitled "An Act to give a preferable lien on Wool, from season to season, and to make Mortgages on Sheep, Cattle, and Horses valid without delivery to the Mortgagee," enables a Proprietor of Sheep to make a valid pledge of the Wool of his next clip, although no possession is given; and Trover is maintainable by a Mortgagee to whom a preferential lien has been so given under that Act; the Mortgagee, whether Agent or Principal, actually in possession being to be deemed the Proprietor of the Sheep, for the purpose of giving such preferential lien, within the meaning of the Act.—A Banking Company incorporated by Charter, which

COLONIAL LAW—*continued.*

contained a clause declaring that it should not be lawful for the Company to advance money on the security of merchandize, advanced money on the faith of receiving as security a preferential lien on the Wool of an ensuing clip to be shorn from the Sheep of the party in whose favour the advances were made, but who was not in the actual possession of the Sheep, though a part Owner of the Sheep and the Agent of the other Owners for whose benefit the advances had been made:—*Held*, in an action of Trover by the Company on such agreement giving them a preferable lien, that the same was maintainable, and that the Banking Company were entitled to recover for the value of the Wool on such preferential lien. Ayers *v.* The South Australian Banking Company - - - - - - 548

13. —— Bond and Mortgage made in pursuance of an Order of Court by one Executor of his Testator's real estate in *Ceylon*, for the necessary expenses for the cultivation of the estate, and a Fiscal sale in execution of a decree in consequence of the default in payment by such Mortgagor, upheld; notwithstanding an attempt to repudiate the Mortgage and set aside the sale by a co-Executor and Devisee in trust under the Will of the Testator on an allegation of collusion with the purchaser, and that such Executor was not a party to the Mortgage.—The supreme Court at *Ceylon* being a Court of Law and Equity, it is in accordance with the practice in that Court, that for moneys *bonâ fide* advanced to an Executor or Administrator for the purposes of the estate which he represents, a suit may be sustained against him in his representative character, and judgment and execution had against the Testator's or Intestate's estate; if, however, the Executor or Administrator deals with such estate in breach of his duty, a person who is party to such dealings, or takes any property of the Testator with knowledge of a breach of trust, will not be allowed to retain any benefit therefrom.—An Executor by the law in force in *Ceylon* has the same powers as an English Executor, with the addition that it extends to immoveable as well as moveable property. Gavin *v.* Hadden - - - - - - 707

COLONIAL LEGISLATIVE ASSEMBLY.] By the Constitution Act for the Colony of *Victoria* (The Imperial Statute, 18 & 19 Vict. c. 55, s. 35, and the Colonial Act, 20th Vict. No. 1) power is given to the Legislative Assembly of *Victoria* to commit by a general Warrant for contempt and breach of privilege of that Assembly.—*G.* was declared by the House of Assembly of *Victoria* to have committed a contempt and breach of privilege, and, under the Speaker's Warrant, which was in general terms, without specifying any specific offence, *G.* was committed to Gaol. *G.* was afterwards brought up by *Habeas Corpus* and discharged out of custody by the Chief Justice of the Supreme Court in the Colony, on the ground that the above Constitution Statute and Colonial Act did not confer upon the Legislative Assembly the same powers, privileges, and immunities as are possessed by the House of Commons. On appeal, *held* by the Judicial Committee:—First, that the Statute and Act gave to the Legislative Assembly the same powers and privileges as the House of Commons had at the time of the passing of the 18 & 19 Vict. c. 55, of committing for contempt;—Secondly, that, incident to those powers and privileges, there was vested in the Legislative Assembly the right of judging for itself what constituted a contempt, and of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt and breach of privilege, by a general Warrant, without setting forth the specific grounds of such commitment; and—Thirdly, that as *G.* had been guilty of a contempt and breach of the privilege of the Legislative Assembly, and had been duly committed, therefore, the Supreme Court had no power to discharge him out of custody. The Speaker of the Legislative Assembly of Victoria *v.* Glass - - - - - - 560

COMMON LAW PROCEDURE ACT (VICTORIA): *See* Colonial Law. 2.

COMMUNION SERVICE.] Position of celebrant while consecrating the Elements. Hebbert *v.* Purchas - - - - - 605

COMPENSATION: *See* Colonial Law. 1.

COMPULSORY PILOTAGE.] In a case of damage by collision occasioned by a Vessel while in tow of Steam-tug having a licensed Pilot on board, in pursuance of the Statute, 17 & 18 Vict. c. 104, s. 388, and no blame attached to the Master or crew:—*Held*, that the Owners of such Vessel were not liable, being protected by that section of the Statute. The "Ocean Wave" - 205

COMMIXTIO: *See* Bailment.

CONFLICT OF LAWS: *See* Colonial Law. 11.

CONSTRUCTION OF BENGAL LETTERS PATENT OF 1865, sec. 36, AND THE 26th RULE OF THE HIGH COURT, where two Judges in the appellate jurisdiction differ in opinion. Miller *v.* Barlow 733

CONSTRUCTION OF STATUTE, 59 Geo. 3, c. 69, s. 7: *See* Foreign Enlistment.

CONSTRUCTIVE POSSESSION AND DELIVERY: *See* Lien.

CONSTRUCTIVE TOTAL LOSS: *See* Insurance (Marine).

CONTEMPT OF COURT: *See* Colonial Bar.

CONTEMPT OF LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES: *See* Colonial Legislative Assembly; Pleading.

CONTRACT: *See* Bailment.

CONTINUING SECURITY: *See* Promissory Note.

CORN deposited with Miller for the general purposes of his trade, *held* not to be in trust. The South Australian Insurance Company *v.* Randell - - - - - 101

COSTS.] On granting special leave to appeal a sum of £300 was deposited as security for the Respondents' costs. Three sets of Respondents appeared separately. In affirming the decree appealed from it was ordered, that if the taxed costs of the Respondents amounted to a larger sum than one-third of the sum so deposited it was to be divided rateably. Lyall *v.* Jardine [318

2. —— On reversal of an Order of the Court below no costs were given, as special leave to appeal was only allowed to decide an abstract

COSTS—*continued.*
question of constitutional law. The Speaker of the Legislative Assembly of Victoria *v.* Glass [560

3. —— *Semble:* Where there has been a mistake upon some matter of law that governs or affects the costs of the suit, the party prejudiced has a right to have the benefit of its correction by appeal. The "Orient" - - - 696

CRIMINAL INFORMATION: *See* Pleading.

CROWN GRANT of land at *Natal* for Cathedral Church. The Bishop of Cape Town *v.* The Bishop of Natal - - - - 1

CUSTODY OF INFANT.] Liberty given for access to infant by Mother pending appeal. *In re* Skinner - - - - - 451

CUSTOMS ORDINANCES (*Cape of Good Hope*): *See* Colonial Law. 10.

DAMAGE TO CARGO.] A cause of damage to cargo, instituted under sect. 6 of the Act, 24 Vict. c. 10, by the Consignees, who were also Assignees of the Bills of lading, to recover damages on account of breaches of contract and duty with respect to certain parcels of Oil-cake, which in the Bills of lading were agreed to be delivered in the like good order and condition as when shipped, the dangers of the Seas only excepted; but the Oilcake, when delivered, was in a greatly damaged and deteriorated condition, occasioned by the packing and stowage:—*Held*, that as the proximate cause of damage arose from the nature and collocation of the cargo, consisting of animal, vegetable, and to some extent putrescible matter, and the want of due ventilation, it was not brought within the legal exception of "dangers of the Seas." The "Freedom" - - 594

—— to Ship occasioned by the sole fault of Pilot. Exemption of Owner by Statute, 17 & 18 Vict. c. 104, s. 388. The "Ocean Wave" - 205

—— Cause of, against Ship: *See* Pleading. 2.

DAMAGES: *See* Bill of Exchange.

DANGERS OF SEA, excepted in Bills of lading; effect of exception: *See* Damage to Cargo.

DEBTOR AND CREDITOR: *See* Colonial Law. 1, 11.

DECISIONS OVERRULED, &c.]—1. The principles laid down in the case of *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365) referred to and confirmed. Martin *v.* Mackonochie - - - 52

2. —— The authority of *Parmeter* v. *Todhunter* (1 Camp. 541), with respect to the form of notice of abandonment, observed upon and questioned. Currie *v.* The Bombay Native Insurance Company - - - - - - 72

3. —— The case of *Scott* v. *The London and St. Katherine's Docks Company* (3 H. & C. 596) distinguished. Moffatt *v.* Bateman - 115

4. —— The case of *Weir* v. *Aberdeen* (2 B. & Ald. 320) observed on and discussed. The Quebec Marine Insurance Company *v.* The Commercial Bank of Canada - - - - 284

5. —— The case of *Carter v. Dimmock* (4 H. L. C. 337) explained. Lyall *v.* Jardine. [318

6. —— *The Marie Jane* (14 Jur. 857) commented on. The "Sappho" - - - 690

DELIVERY: *See* Bailment.

DEPOSIT OF TITLE-DEEDS AS SECURITY FOR DEBT: *See* Colonial Law. 6.

DEPRIVATION, SENTENCE OF: *See* Ecclesiastical Law. 3.

DIRECTORS OF A JOINT STOCK COMPANY—personal liability of, for acts *ultrà vires*. Cherry *v.* The Colonial Bank of Australasia - 24

DISOBEDIENCE TO MONITION: *See* Ecclesiastical Law. 1.

DISTRIBUTION OF ASSETS: *See* Colonial Law. 11.

DOCTRINE OF CHURCH OF ENGLAND: *See* Ecclesiastical Law.

DOMICIL.] Will of Testator domiciled in the *North-West Provinces of India*, of unascertained religion. Barlow *v.* Orde - - 164

—— *See* Colonial Law. 11.

DUPLICITY: *See* Pleading. 1.

EAST INDIANS, WILL OF: *See* Will.

ECCLESIASTICAL LAW.]—1. Motion to enforce obedience to a Monition to carry into effect an Order in Council, which, among other things, prohibited the Respondent from elevating the Cup and Paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated Elements, and from using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such lighted Candles were not wanted for the purpose of giving light.—It appeared that the elevation of the Cup and Paten for which the Respondent had been articled and complained of in the Court below, was an elevation above his head, which was the only mode of elevation pleaded in the Article, after it had been reformed, to have been practised by him, and was, therefore, that prohibited by the Sentence of the Court below, which Sentence had been affirmed on appeal, but that the Respondent had substituted for such, an elevation only to the level of his head: their Lordships were, therefore, of opinion, though disapproving and discountenancing any elevation of the Elements whatever, that, in the state of the pleadings, the illegality of the elevation since practised by the Respondent not being raised, he had technically complied with the terms of the original Sentence and Order, and could not be held to have disobeyed the Monition in that respect.—That with regard to the kneeling, it was proved by the evidence, as well as the admission of the Respondent, that he did prostrate and bow his knee at the times alleged, in such a manner as to be unable himself to say, whether he touched the ground with his knee, or to make it possible for any one to see, whether he was kneeling or not; and that such prostration was, in their Lordships' opinion, literally kneeling, and alike contrary to the Rubric and to the letter and spirit of the Monition.—That respecting the lighted Candles, it appeared that the Candles on the Communion Table, though lighted and burning during the whole service before the celebration of the Holy Communion, and until the commencement thereof, were then extinguished. Their Lordships were,

ECCLESIASTICAL LAW—*continued.*

therefore, unable to hold, that there had not been a literal compliance with the strict terms of the Monition; though the charge made by the motion, and established by the evidence, was, as in part contained in the original Order, for using Candles on the Communion Table at times when they were not wanted for the purpose of giving light.—Under the circumstances, their Lordships expressed their opinion, that the Monition had been disobeyed with reference to the kneeling during the prayer of Consecration, and monished the Respondent to abstain therefrom for the future: and to mark their disapprobation of his course of proceeding, ordered him to pay the costs of the motion. MARTIN *v.* MACKONOCHIE - 52

2. ——. In a suit instituted under the *Church Discipline Act*, 3 & 4 Vict. c. 86, against a Clerk in Holy Orders, a Minister of a Chapel without a District, by Letters of Request, the Promoter being a Parishioner of the Parish within which the Chapel was situated, for offences against the Laws Ecclesiastical by the use of certain rites and ceremonies set forth in the Articles exhibited; sentence was pronounced by the Arches Court against him upon some, but not on all, of the Articles. The Promoter of the suit appealed from such sentence to the Queen in Council, but, after Inhibition and Citation had issued, died. On a motion for the substitution of another Parishioner as Promoter of the appeal, who was not authorized by the Ordinary, or connected with the original Promoter, and had no personal or pecuniary interest in the subject matter of the suit:—*Held*, that though the suit, as a criminal suit, had determined by the death of the original Promoter, yet, having regard to the ancient practice of the Court of Delegates in such cases, and the peculiar circumstances of the suit, it was the duty of the Court of appeal not to permit its abatement, but to allow a proper person to be substituted in the place of the deceased Appellant, and to revive the appeal. —*Semble*, it is not necessary, in such circumstances, that the proposed substituted Promoter should be clothed with the character of one executing the Office of Judge at the instance of the Bishop, whose permission cannot be demanded *ex debito justitiæ*. ELPHINSTONE *v.* PURCHAS 245

3. —— In charges against a Clergyman for maintaining and promulgating doctrines contrary to, and inconsistent with, divers of the Thirty-nine Articles of Religion, the Judicial Committee is not compelled, as in cases affecting the right to property, to affix a definite meaning to any given Article, where such Article is really a subject of dubious interpretation. It is, however, very different where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them. It is not requisite in such case that the contradiction of the Articles should be a contradiction *totidem verbis*; it is sufficient if the opinions published, or promulgated, be repugnant to, or inconsistent with, their clear construction.—It is not competent for any Clergyman, of his own mere will, not founding himself upon any critical inquiry, but simply upon his own taste and judgment, to assert that whole passages of some of the Canonical Books are without any authority whatever, as being contrary to the teaching of Christ as contained in others of the Canonical Books. Articles of Charge against a Clerk in Holy Orders and Incumbent of a Vicarage and Parish Church, for an Offence against the Laws Ecclesiastical of the Realm, in having printed, published, and set forth certain volumes of Sermons, in which he advisedly maintained and affirmed doctrines directly contrary or repugnant to, and inconsistent with, divers of the Thirty-nine Articles of Religion and Formularies of the Church of *England*, the alleged errors being—(1) Concerning the reconciliation of God to man by the sacrifice or propitiation of Our Lord Jesus Christ, and as to the necessity of such reconciliation; (2) As to the Incarnate Godhead of Our Lord, and the doctrine of the Holy Trinity; (3) As to the authority of the Scriptures or Holy Writ:—admitted and sustained. Such several errors and doctrines so charged to have been maintained and affirmed, *held* sufficiently proved by the incriminated passages extracted from the said Sermons, and set forth in the Articles of Charge, as being respectively repugnant to, and inconsistent with, the several Articles of Religion to which they were pleaded as contrary to and opposed, without reference to the Formularies of the Church to which they were also pleaded to be repugnant and inconsistent: and sentence of deprivation of all Ecclesiastical promotion, especially the Vicarage of which he was Incumbent, pronounced against such Clerk, unless, within a week from the delivery of the judgment, he should expressly and unreservedly retract the several errors in which he had so offended, and which he refused to do. VOYSEY *v.* NOBLE - 357

4. —— Motion against the Respondent, the Perpetual Curate of the parish of *St. Alban's, Holborn*, for disobedience to a Monition founded upon an Order in Council, which ordered him (amongst other things) to abstain for the future "from the elevation of the Cup and Paten during the administration of the Holy Communion, and from kneeling and prostrating himself before the consecrated Elements during the prayer of Consecration;" in that he knowingly and habitually sanctioned the elevation of the Cup and Paten above the head of the Officiating Clergyman in the prayer of Consecration, and knowingly and habitually sanctioned kneeling and prostration during the prayer of Consecration. It appeared that the ordinary course pursued in the administration of the Holy Communion in the Respondent's Church was for the Officiating Clergyman, on reaching the words of institution in the prayer of Consecration, to drop his voice so as to be nearly inaudible; that he then elevated (not the Paten but) a large wafer bread, and replacing it upon the Communion Table, bowed his head down towards the Table, and remained some seconds in that position; that he then elevated the Cup so that the rim was some inches above his head, and replacing it on the Table bowed as before, after which the administration of the Elements commenced:—*Held*, by the Judicial Committee, that such elevation of the wafer was equivalent to an elevation of the Paten, the elevation which is unlawful being that of the consecrated Bread itself, and not the Paten in which it is placed; that the

ECCLESIASTICAL LAW—*continued.*

bowing of the head in the manner described at the prayer of Consecration, though without bending the knee, was a prostration before the consecrated Elements, whereof the sanctioning was a disobedience of the Monition, and the Order in Council for such disobedience to the Monition: and the Respondent ordered to be suspended from the discharge of all clerical duties and offices and the execution thereof for the space of three calendar months.—*Semble*, as the 28th of the Articles of Religion prohibits all elevation of the Elements, by declaring, that "The Sacrament of the Lord's Supper was not by Christ's Ordinance reserved, carried about, lifted up, or worshipped;" it is not necessary to article and describe a particular elevation during the prayer of Consecration, but sufficient to state and prove that such elevation occurred during the administration of the Holy Communion. Martin *v.* Mackonochie - 409

5. —— According to the true construction of the Act, 5 Geo. 4, c. 36, the Owner of a tithe rent-charge in a Parish (though not liable to be rated to an ordinary Church-rate) is liable to be assessed to a rate made for the repayment of money borrowed by the Churchwardens and Overseers from the Public Works Loan Commissioners, under the provisions of that Act, for the purpose of repairing and enlarging the Parish Church, including the Chancel. Smallbones *v.* Edney 444

6. —— Construction of the Notice termed 'The Ornaments-Rubric' prefixed to 'The Order for Morning and Evening Prayer,' which provides "*That such Ornaments of the Church, and of the Ministers thereof, at all Times of their Ministration, shall be retained, and be in use, as were in this Church of England, by the Authority of Parliament, in the Second Year of the Reign of King Edward the Sixth;*" and of the Rubric prefixed to 'The Order of the Administration of the Lord's Supper, or Holy Communion,' which describes "*the Priest standing at the North side of the Table,*" with that which precedes the 'Prayer of Consecration,' and enjoins "*When the Priest, standing before the Table, hath so ordered the Bread and Wine, that he may with more readiness and decency break the Bread before the People, and take the Cup into his hands, he shall say the Prayer of Consecration,*" as well as that appended to the same Service regarding the sacred Elements; and of the Rubric appended to the service for the Holy Communion; that "*To take away all occasion of dissension, and superstition, which any person hath or might have concerning the Bread and Wine, it shall suffice that the Bread be such as is usual to be eaten; but the best and purest Wheat Bread that conveniently may be gotten.*"—First, as regards the Vestments of the Minister whilst officiating in the administration of the Holy Communion, or in other Ministrations, the 'Ornaments-Rubric,' as explained by the Injunctions of Queen *Elizabeth*, A.D. 1559, and the Advertisements of *Elizabeth*, A.D. 1564, made pursuant to the *Act of Uniformity*, 1 Eliz. c. 2, and explained by subsequent Visitation Articles; when construed with the Canons of 1603–4, and the *Act of Uniformity*, 13 & 14 Car. 2, c. 4; does not permit the use by the Minister while officiating at the Holy Communion of the *Chasuble*, the *Alb*, or the *Tunicle*, but allows of the *Cope* being worn in ministering the Holy Communion on High feast days, in Cathedrals and Collegiate Churches, and requires the use of the *Surplice* in all other Ministrations. The use of the *Chasuble*, *Alb*, and *Tunicle* by the Celebrant while officiating in the Communion Service, is illegal.—Second, the Rubrics regarding the position of the Minister during the Communion Service designate the North side of the Communion Table as the proper place for the Minister throughout the Communion Service, and, also, whilst reading the Prayer of Consecration, his proper position therefore is, on the North side, or the North end of the Table, if it is placed east and west, facing the south, and not at that part of the west side of the Table which is nearest to the north; the object being that the People may see him break the Bread and take the Cup into his hands, which they cannot do if he stand with his back to the People, and between the People and the Holy Table.—Third, the Rubric regarding the Elements requires that the Bread to be used at the Holy Communion be pure Wheaten Bread, as is directed by the Canons of 1603–4, and not Wafer Bread, which is illegal; and does not allow the administering of Wine mixed with Water, instead of Wine only, to the Communicants at the Lord's Supper: whether the Water be mingled with Wine before or during the Communion Service.—*Semble*, the use of a *Biretta*, or Cap, as a vestment in the Service of the Church is illegal.—*Semble*, the provisions of the Canons of 1603–4 and Prayer Book must be read together, as far as possible, and the Canons 17, 25, and 58, upon the vestments of the Ministers are an exposition and limitation of the 'Ornaments-Rubric.' Such Ornaments are to be limited, as to the Vestments, by the special provision of the Canons themselves, which were not repealed by the *Act of Uniformity*, 13 & 14 Car. 2, c. 4.—The cases of *Westerton* v. *Liddell* (Moore's Special Rep.) and *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365) considered and confirmed. Hebbert *v.* Purchas - - - 605

EQUITABLE MORTGAGE: *See* Colonial Law. 6.

EVIDENCE.] Certificate of Notary Public in *Upper Canada*, effect of, in Court in *Lower Canada*, where the French law prevails. Nye *v.* Macdonald - - - - - 331

EXECUTION CREDITORS: *See* Lien.

EXECUTOR, title of, by the Law of *Jersey*, to administer the moveable estate of Testator. La Cloche *v.* La Cloche - - - 125

2. —— Power of, by the Law in force in *Ceylon*, to mortgage or alienate his Testator's real estate. Gavin *v.* Hadden - - - - 707

EXECUTOR OF AN EXECUTOR.] Right of, to an account of original Testator's estate. Smith *v.* O'Grady - - - - - 311

EXTENSION OF TERM OF LETTERS PATENT: *See* Patent.

EXTINGUISHMENT OF MUTUAL DEBTS: *See* Colonial Law. 1.

FINE FOR CONTEMPT OF COURT: *See* Colonial Bar.

FIRE INSURANCE: *See* Bailment.

FITTING-OUT TRANSPORT OR STORE SHIP FOR USE OF INSURGENTS IN ARMS AGAINST A FRIENDLY POWER; *See* Foreign Enlistment.

FOREIGN ATTACHMENT: *See* Colonial Law. 2.

FOREIGN BILL: *See* Bill of Exchange.

FOREIGN ENLISTMENT.] The *Foreign Enlistment Act*, 59 Geo. 3, c. 69, for prevention of enlisting into Foreign Service, or the fitting out or equipping in Her Majesty's dominions, Vessels for warlike purposes, provides by sect. 7, (1) That such Ship or Vessel must be acting without leave or license of the Sovereign of this Country; (2) That she must be equipped, furnished, fitted-out, or armed, or there must be a procuring, or an attempt, or endeavour to equip, furnish, fit-out, or arm the Ship; (3) That such equipment, furnishing, fitting-out, or arming, must be done with the intent or in order that the Ship or Vessel shall be employed in the service of some "Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, or of any Person or Persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People;" (4) That there must be an intent to employ the Ship or Vessel either as a Transport or Store-ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, or against the subjects or Citizens of such Prince, &c., or the persons exercising, or assuming to exercise, the powers of Government in any Colony, Province, or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province, or part of any Province or Country; (5) That such Foreign Prince, State or Potentate, &c., is one with whom His Majesty should not then be at war.—A Vessel having been seized under warrant from the Governor of the *Bahama Islands*, and proceeded against in the Vice-Admiralty Court there, for breach of the 7th section of the *Foreign Enlistment Act*, was, upon the hearing of the cause, ordered to be restored, the Vice-Admiralty Court not being satisfied that the Vessel was engaged, within the meaning of that section, in aiding parties in insurrection against a Foreign Government, as such parties did not assume to exercise the powers of Government over any portion of the territory of such Government. Such decision overruled on appeal by the Judicial Committee on the ground that it was established, that there was an insurrection in the island of *Cuba*, the Foreign Government in question; that there were Insurgents who had formed themselves into a body of people, who formed part of the Province or people of *Cuba*, acting together, and undertaking and conducting hostilities; that the Vessel was employed as a Transport or Store-ship in connection with, and in the service of, this body of Insurgents; and that the Judge of the Court below had miscarried in confining his attention to the second alternative of the third branch of the section, which requires that the person or persons aided must be exercising, or assuming to exercise, the powers of Government. The "Salvador" 218

FOREIGN LAW.] According to the law of *Malta*, the real estate of an intestate is equally divisible among the co-heirs.—By the Ordinances and Code

FOREIGN LAW—*continued.*

in force in the Island, where property possessed in common cannot be "conveniently divided, and without disadvantage," the same must be sold by auction.—In the suit for the partition of a Villa residence with outhouses and ornamental grounds, which had devolved by the intestacy of its late owner on his ten children, and which, in the opinion of the Court below, after reference to Experts, could not be so divided; the decree made therein for a sale by auction in its entirety, and the subsequent division of the amount realized in equal shares, confirmed by the Judicial Committee.—*Semble*, it is not competent for the parties in such a suit to propose, at the hearing of the appeal, a fresh reference to Experts for the purpose of suggesting another scheme for the division of the property in litigation. Bugeja *v.* Camilleri 258

FOREIGN PATENT FOR THE SAME INVENTION NOT EXPIRED: *See* Patent. 1.

FOREIGN RAILWAY COMPANY: *See* Jurisdiction of Supreme Consular Court at Constantinople.

FORFEITURE OF SHIP FOR VIOLATION OF THE PROVISIONS OF Sect. 7 of STATUTE, 59 Geo. 3, c. 69: *See* Foreign Enlistment.

FORFEITURE UNDER THE CAPE OF GOOD HOPE CUSTOMS ORDINANCE, No. 6 of 1853, for defective Bill of entry of goods. Graham *v.* Pocock - - - - - 345

FRAUDULENT INTENTION is not necessary to render a person liable to penalties under section 50 of the *Cape of Good Hope* Customs Ordinance, No. 6, of 1853. Graham *v.* Pocock - - 345

FRENCH LAW IN LOWER CANADA: *See* Colonial Law. 1, 5, 9.

GARNISHEE: *See* Colonial Law. 2.

GIFT "TO CHILDREN" AS A CLASS: *See* Will.

GROSS NEGLIGENCE: *See* Negligence.

HERESY in maintaining and publishing doctrines contrary to the Thirty-nine Articles of Religion: *See* Ecclesiastical Law. 3.

HYPOTHECATION: *See* Bottomry Bond; Colonial Law. 6, 11.

ILLEGITIMATE CHILDREN: *See* Will.

IMPLIED AUTHORITY.] Two of the Directors of a Joint Stock Company, by a letter to the Company's Bankers, notified that their Manager had authority to draw cheques on account of the Company. Such two Directors did not form a majority of the Directors of the Company, as required by their Act of incorporation, so as to bind the Company. Although the Company's account was at the time overdrawn, and that fact was known to the two Directors, the Bankers honoured the Manager's cheques on the authority so given to them. In an action brought by the Bank against the two Directors for advances made on account of the Company upon the faith of their letter, the Court below *held*, that there was an implied warranty on their part, and that they were personally liable to the Bank, and judgment was given to the extent of the sums

IMPLIED AUTHORITY—*continued.*

overdrawn by the Manager subsequent to the date of their letter. Such judgment sustained on appeal. CHERRY *v.* THE COLONIAL BANK OF AUSTRALASIA - - - - - 24

IMPLIED WARRANTY: *See* SEAWORTHINESS.

INDIAN INSOLVENT ACT.] Proceedings were taken under the *Indian Insolvent Act*, 11 & 12 Vict. c. 21, and the proceeds of certain goods claimed by the Official Assignee, and the amount paid by the Assignee into the *Bank of Bengal*. On a suit brought in the High Court at *Calcutta*, by *A.* against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court:—*Held*, on the Court making a decree in favour of the Plaintiff, that the High Court, being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee. MILLER *v.* BARLOW - 733

INFANT: *See* CUSTODY OF INFANT.

INSOLVENCY.] A Firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also, the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one Creditor to others after a debt has been incurred. MILLER *v.* BARLOW - 733

INSOLVENCY OF OWNER OF THE VESSEL: *See* BOTTOMRY BOND.

INSOLVENT ORDINANCE, CAPE OF GOOD HOPE, No. 6, of 1843: *See* COLONIAL LAW. 11.

INSURANCE (FIRE): *See* BAILMENT.

INSURANCE (MARINE).] Suit brought to recover the amount of two Policies of Insurance upon the cargo and disbursements respectively of a Ship; both Policies being for a total loss. The Ship having become a wreck, the Captain, without taking any steps to save or discharge the cargo, deeming such impracticable, proceeded to dismantle the Ship, and gave notice to the Insurers of abandonment of the cargo, and sold both Ship and cargo by public auction. A large part of the cargo was afterwards saved. The Court below held, that as the cargo might have been, and was, in fact, partially saved, there was no such total loss of the cargo and freight as entitled the Assured to recover on either of the Policies. Such ruling, as regarded the cargo, affirmed, but as the Ship when she was reduced to a wreck, was incapable of earning any freight, the Judicial Committee were of opinion, that there was such a total loss of the disbursements, to be paid out of the freight, as to entitle the Assurers to recover on that Policy. CURRIE *v.* THE BOMBAY NATIVE INSURANCE COMPANY - - 72

INSURANCE (RIVER AND SEA POLICY): *See* SEAWORTHINESS.

INSURRECTION IN CUBA: *See* FOREIGN ENLISTMENT.

INTEREST.]—1. By an Order in Council made on an appeal, the judgment of the Supreme Court at *Hong Kong*, in an action of Trover, was reversed, and a nonsuit directed to be entered, whereof "the Governor, Lieutenant-Governor

INTEREST—*continued.*

&c., for the time being, and all other persons whom it may concern, were to take notice and govern themselves accordingly." On the receipt of this Order in the Colony, the successful Appellant, to carry the Order into execution, applied to the Supreme Court for an Order for repayment of the amount of the judgment, with interest upon the whole sum paid by way of principal and interest by the Appellant. The Supreme Court was of opinion, that as there were no express directions in the Order in Council for payment of interest on the judgment, it had no power to allow interest, and refused to make any Order thereon:—*Held*, reversing such decision; that although by the terms of the Order in Council the judgment of the Supreme Court was only reversed, and a nonsuit directed to be entered, yet, (1) that interest upon the judgment was to be implied under the general words there used; and (2) that inasmuch as under the general Regulations of 1845, applicable to appeals from *Hong Kong* to the Queen in Council, the Supreme Court is to execute and carry into effect the judgments and Orders of the Queen in Council, that Court had power, without more, to have ordered payment of interest; as otherwise the successful Appellant would not be restored to all he had lost by reason of the judgment being reversed. RODGER *v.* THE COMPTOIR D'ESCOMPTE DE PARIS - - - - - 465

2. —— Interest on money paid to the Official Assignee in Insolvency in *India* in proceedings in Insolvency, and deposited by him in the Bank, allowed by the High Court at *Calcutta* in a suit to recover the amount. MILLER *v.* BARLOW - 733

INTESTACY.] Succession of co-heirs, by the Law of *Malta*. BUGEJA *v.* CAMILLERI - - 258

JAMAICA, LAW OF: *See* COLONIAL LAW. 7.

JERSEY, LAW OF: *See* COLONIAL LAW. 4.

JOINT ADJUDICATION IN BANKRUPTCY: *See* BANKRUPTCY.

JOINT AND SEPARATE ESTATE OF BANKRUPT: *See* COLONIAL LAW. 11.

JOINT STOCK COMPANY: *See* IMPLIED AUTHORITY.

JOINT STOCK COMPANIES ACTS, 1856, 1857: *See* JURISDICTION OF SUPREME COURT AT CONSTANTINOPLE.

JUDGMENT, reversal of: *See* INTEREST. 1.

JURISDICTION OF ADMIRALTY COURT IN A CAUSE OF DAMAGE, WHERE AN ACTION AT LAW HAD PREVIOUSLY BEEN TRIED.] Where there is a remedy both *in personam* and in *rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other. THE "ORIENT" - 696

JURISDICTION OF COURT OF QUEEN'S BENCH IN LOWER CANADA, TO COMMIT FOR CONTEMPT. *In re* RAMSAY 427

JURISDICTION OF JUDICIAL COMMITTEE.]—1. *Quære*, whether it is requisite, on a motion for the appointment of a new Promoter in an appeal under sect. 16 of the *Church Discipline Act*, 3 & 4 Vict. c. 86, that an Archbishop or Bishop, being a Privy Councillor, should be present to render the Judicial Committee competent to entertain the Motion. ELPHINSTONE *v.* PURCHAS - - 245

JURISDICTION OF JUDICIAL COMMITTEE—*cont.*

2. ——. After judgment had been delivered by the Judicial Committee, but before their report and recommendation had been presented, or any Order made thereon by Her Majesty in Council, the Respondent presented two Petitions addressed to Her Majesty in Council, stating that the appeal had been heard *ex parte* by reason of his want of pecuniary means to employ Counsel, and his own inability to argue the case; and that (as he alleged) the judgment of the Judicial Committee in the appeal was at variance with former decisions of the Judicial Committee; he prayed for a re-hearing of the Appeal, and that no report or recommendation might be made thereon to Her Majesty until such re-hearing had been had. Both Petitions having been specially referred by Her Majesty to the Judicial Committee, their Lordships, after hearing Counsel, declined to entertain the matter of the Petitions, or to allow any doubt to be thrown on the finality of the decisions of the Judicial Committee; and dismissed the Petitions with costs. Hebbert *v.* Purchas - - 664

JURISDICTION OF SUPREME CONSULAR COURT OF CONSTANTINOPLE.] A Railway Company and partnership complete and existing in a Foreign Country is not within the purview of the English *Joint Stock Companies Acts*, 1856, 1857, so as to enable H.B. Majesty's Consular Court in *Egypt* to issue a sequestration against such of the members of the Company as were resident within the jurisdiction of that Court, for not complying with an Order of that Court to register the Company as one of limited liability under the English Acts. Bulkeley *v.* Schutz - - - - 764

JURISDICTION OF VICE-ADMIRALTY COURT ABROAD: *See* Piracy.

JURY DE MEDIETATE LINGUÆ.] Right of Alien Prisoner to peremptory challenge. Levinger *v.* Reg. - - - - - 282

LACHES: *See* Colonial Law. 7; Limitation. 1.

LEAVE TO APPEAL: *See* Practice. 1, 4, 7, 8, 11.

"LE MORT SAISIT LE VIF": *See* Colonial Law. 4.

LETTERS PATENT appointing Bishops of *Cape Town* and *Natal*; effect of resignation of Bishop of *Cape Town*, and reappointment as Metropolitan, with respect to trust of English Church at *Natal*. The Bishop of Cape Town *v.* The Bishop of Natal - - - - - - - 1

LETTERS PATENT FOR INVENTIONS: *See* Patent.

LIEN.] Goods imported from *England* into *Quebec*, consigned to *M. & S.*, and stored in the Customs Warehouse there, according to the Customs regulations, for freight, duties, and storage, were, by a contract in writing, pledged by *M. & S.* for advances made to them by *G. & K.*, and a note of such pledge entered in the Book of the Chief Officer of the Customs, specifying the conditions on which the loan was made, with a request to such Officer to hold the goods subject to the orders of *G. & K.*, they paying the duty and storage charges before

LIEN—*continued.*

removal. *L.*, a Creditor of *M. & S.*, obtained judgment in an action against them, and, under a *fieri facias*, seized the goods so in Bond, the execution of which was opposed by *G. & K.*, who made an application *main levée* to the Court, on the ground, that by the above contract the property of *M. & S.* in the goods in question was conveyed to them to secure payment of the advances made by them. The Judge of the Superior Court allowed such opposition, holding that the Opposants, *G. & K.*, were Pledgees of the goods in question. Such judgment, though overruled by the full Court, and afterwards by the Court of Queen's Bench in *Lower Canada* on appeal, upheld by the Judicial Committee, who were of opinion, that the circumstances of the case and the dealings of the parties constituted a constructive delivery, and that the judgment which dismissed the opposition of *G. & K.*, and gave effect to the seizure under the execution to their prejudice as Pledgees, could not be supported. Young *v.* Lambert 142

LIGHTS, ADMIRALTY REGULATIONS REGARDING: *See* Ship and Shipping. 2.

LIMITATION.] Lapse of time will not of itself bar an Executor of an Executor of his right to have an account of his Executor's Testator's estate taken, with a view to ascertain such Executor's liabilities as an accounting party. Smith *v.* O'Grady - - - - 311

2. —— Tenant at will without interruption for more than twenty years, during which period he let and transferred portions of the land, with the knowledge, and without the interference of the Owner in fee: *held* to have acquired an indefeasible title against the Owner, whose right of entry after that period was barred by the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, ss. 2, 7, 34, introduced in *New South Wales* by Act, No. 3 of 1837. Day *v.* Day - - - - 751

LOWER CANADA CIVIL CODE, tit. "Obligations," sec. V. Nos. 1187–8, construction of. Ryland *v.* Delisle - - - - - 17

LOWER CANADA CONSOLIDATED STATUTES, ch. 77: *See* Colonial Law. 1.

LOWER CANADA, LAW OF; *See* Colonial Law. 1, 5, 9.

MALTA, LAW OF: *See* Foreign Law.

MANUFACTURER—Where the Patentee is also a Manufacturer of the Patented article, his profits as a Manufacturer are taken into consideration in an application for extension of the term of his Letters Patent. *In re* Saxby's Patent - - 292

MARINE INSURANCE ON CARGO AND DISBURSEMENTS.] Possible recovery of cargo, effect of, on policy. Currie *v.* The Bombay Native Insurance Company - - - - 72

MARRIAGE SETTLEMENT, made in England affecting real estate in the *Cape of Good Hope*, effect of Wife's interest in competition with Creditors. Thurburn *v.* Steward - - 478

MASTER AND SERVANT: *See* Negligence.

MERCHANT SHIPPING ACT OF 1862: *See* Ship and Shipping. 1.

MONITION, ENFORCEMENT OF; *See* Ecclesiastical Law. 1.

MIS-STATEMENTS OF FACTS IN PETITION FOR SPECIAL LEAVE TO APPEAL, effect of. Bulkeley *v.* Schutz - - - - - 196

MIXED CHALICE: *See* Ecclesiastical Law. 6.

MONITION, disobedience to—motion to enforce. Martin *v.* Mackonochie - - - 409

MORTGAGE BY EXECUTOR of immovable estate in *Ceylon*, for the purpose of the estate of his Testator. Gavin *v.* Hadden - - 707

MORTGAGEE OF SHIP, effect of notice to, before resorting to Bottomry. The "Panama" - 199

MUTUAL DEBTS: *See* Colonial Law. 1.

NATAL, LAW OF: *See* Colonial Bishop.

NATIONAL BANK OF AUSTRALASIA—POWER OF THE BANK TO HOLD LANDS: *See* Colonial Law. 6.

NEGLIGENCE.] Action for negligence by the Defendant in conveying the Plaintiff, who was a Decorator and Gardener in his service, to perform for him certain work. The Defendant drove, and while on the road the kingbolt of the carriage broke, the Horses bolted, the Carriage was overturned and the Plaintiff injured. There was no evidence of gross neglect on the part of the Defendant:—*Held* (overruling the judgment of the Court below),—First, that in the absence of any evidence of gross negligence on the part of the Defendant the Plaintiff was not entitled to recover damages.—Secondly, that the evidence did not disclose such negligence as to render the Defendant, performing a gratuitous service for the Plaintiff, responsible.—The case of *Scott* v. *The London and St. Katherine's Docks Company* (3 H. & C. 596) distinguished. Moffatt *v.* Bateman - - - - - 115

NEGLIGENCE OF AGENT: *See* Bill of Exchange.

NEW SOUTH WALES, LAW OF: *See* Limitation. 2.

NOTARY PUBLIC, CERTIFICATE OF: *See* Colonial Law. 9.

NOTICE BY MASTER TO OWNER OF SHIP, necessary, when practicable, before resorting to Bottomry Bond.—Notice to Mortgagee will not suffice. The "Panama" - - - 199

NOTICE OF ABANDONMENT: *See* Insurance (Marine).

ORDER IN COUNCIL, made on appeal, construction of: *See* Interest.

ORDINANCES AND WATER REGULATIONS OF THE GOVERNOR AND COUNCIL OF THE CAPE OF GOOD HOPE, effect of. Van Breda *v.* Silberbauer - - - - - - 84

PARTITION, SUIT FOR: *See* Foreign Law.

PATEN, ELEVATION OF: *See* Ecclesiastical Law. 1.

PATENT.]—1. A Patentee, a Foreigner, patented his invention first in *England* and afterwards in *France*, which latter Patent, at the date of the application for a prolongation of the English Patent, had a year to run:—*Held* by the Judicial Committee, that they could not recommend the Crown to extend the term upon the chance of the French Patent being extended.—*Held*, further, that if the French Patent had expired there was no power in the Committee to recommend an extension of the English Patent.—On the merits, *held*, that an Assignee of the Patentee who had taken an assignment of four-fifths of the Patent within a few months of the expiration of a Patent, which had only just been brought into use, for a small consideration, was not entitled to any extension. *In re* Normand's Patent - 193

2. —— In an application for the prolongation of a Patent it is not the practice of the Judicial Committee to decide upon the novelty or utility of the Patent, except so far as such utility may properly be described as merit of that high degree that, every other requisite being satisfactory, it would entitle the Patentee to a prolongation.—A Patentee in seeking a prolongation of the term of the Patent must satisfy the Judicial Committee by the accounts, in a manner which admits of no controversy, of what has been the amount of remuneration which, in every point of view, the invention has brought him, and it is the duty of the Applicant to frame his accounts in such a shape as to leave no doubt as to what the remuneration has been that he has received.—Where a Patentee is also the Manufacturer, the profits which he makes as Manufacturer, although not strictly profits of the Patent, must yet be taken into consideration in estimating the amount of his remuneration. — Therefore, where, on a petition for prolongation, it appeared that the Patentee was at the same time the Manufacturer of the patented article, and was himself necessarily engaged in fixing and putting up the patented apparatus; and that the accounts for such services were so intermixed as to render it impossible on their face to separate the items of profit received from the Patent, it appearing that, on the whole, the receipts had been very large, and that even on the balance alleged there had been considerable gain to the Patentee, the Judicial Committee held that such accounts were unsatisfactory, and refused the application, but without costs. *In re* Saxby's Patent - 292

3. —— A Petitioner, seeking the grace and favour of the Crown, in applying for an extension of the term of Letters Patent, is bound to bring his accounts before the Committee in such a shape as to leave no doubt what the remuneration has been that he has received from the Patent.—The petition for extension, and the accounts furnished by the Petitioner (the Patentee) not containing sufficiently full and accurate information in respect to the Patent, or the remuneration received by him, the Judicial Committee declined to recommend a prolongation of the term.—The principle, where the statement of the remuneration received by the Patentee, is on the face of the petition and accounts filed unsatisfactory, of adjudicating without reference to the merits of the invention, as acted on in *In re Saxby's Patent* (Law Rep. 3 P. C. 292), recognised. *In re* Clark's Patent - 421

4. —— Prolongation of term of Letters Patent for seven years, the invention being a meritorious one, and of great value as a raw material for the

PATENT—*continued.*

manufacture of paper; no profit having been made either by the Inventor or his Assignees.—The statement of accounts furnished being *primâ facie* satisfactory, the Petitioners were allowed to prove the merits of the invention before going into the accounts.—*In re Saxby's Patent* (Law Rep. 3 P. C. 292) distinguished. *In re* Houghton's Patent [461

PENALTIES FOR BREACH OF CAPE OF GOOD HOPE CUSTOMS ORDINANCE, No. 6 of 1853; *See* Colonial Law. 10.

PEREMPTORY CHALLENGE.]—The *Victoria Juries Act*, No. 272 of 1865, sect. 37, gives a right of peremptory challenge, restricted to the number of twenty, on trial or inquest taken before any Court wherein the Crown is a party. This right is not taken away by the 38th section of the same Act, which, following the 47th section of the Imperial Statute, 6 Geo. 4, c. 50, provides, in the case of aliens, for a jury *de medietate linguæ*; and though the composition of such jury is prescribed by Statute, the incidents of the trial are annexed by the Common Law, and are implied and included therein.—There is no distinction between the alien and denizen portion of a jury *de medietate linguæ* as to the law of peremptory challenge, wherever the case requires it, and the reason of the rule applies. The Common Law regarding juries, in the absence of positive provision to the contrary, is applicable to jurors on a jury *de medietate linguæ*.—An alien Prisoner tried in the Supreme Court in *Victoria*, for Felony, claimed the right of a jury *de medietate*, which was granted. He challenged peremptorily an alien juror. His challenge was demurred to on the part of the Crown, and adjudged bad, and the trial proceeded to conviction and sentence:—*Held* (special leave to appeal having been granted by the Judicial Committee), that he had a right to such peremptory challenge; that the judgment on demurrer denying such right was erroneous, and the verdict and conviction thereon quashed, and a *venire de novo* awarded. Levinger *v.* Reg. - - 282

PIRACY.] Though goods piratically taken, cannot be transferred to a third party as against their legitimate Owner, yet that rule does not apply to a Ship belonging formerly to a Pirate, as the taint of Piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the Ship through her transfers to various Owners.—A Ship was arrested by the Crown in *Tortola*, on a charge of Piracy. The affidavit which led to the Warrant of arrest alleged, that the Ship was bought at *St Marc*, in *Hayti*, from a British subject by the Revolutionary Government of *Hayti*, and that the Ship, having been equipped as a Ship of War, was afterwards employed in acts of hostility. It appeared that the Ship had been sold by public auction, six months before seizure, to a *bonâ fide* purchaser, a British subject. The Vice-Admiralty Court of *Tortola* sustained a protest to the jurisdiction of the Court, and decreed restitution of the Ship, but without costs or damages. On appeal, *held*, by the Judicial Committee (affirming such decree), that there was no authority to be derived from principle or precedent, for a Ship sold by public auction to a *bonâ fide* innocent

PIRACY—*continued.*

Purchaser, before any proceedings have been taken on the part of the Crown against the Ship, being afterwards arrested and condemned on account of having been engaged previously in piratical acts. The "Telegrafo" - 673

PILOT: *See* Compulsory Pilotage.

PLACAAT OF CHARLES V., 4th October, 1540, recognising priority of Husband's creditors over Wife's claims under marriage settlement, *held*, to be in force in the *Cape of Good Hope*. Thurburn *v.* Steward - - - - - 478

PLEADING.]—1. To a criminal information by the Attorney-General of *New South Wales* against a Member of the Legislative Assembly of that Colony, for an assault on a Member committed within the precincts of the House, while the Assembly was sitting, which information averred, that such assault was in contempt of the said Assembly, a general demurrer was allowed by the Supreme Court. On appeal:—*Held*, by the Judicial Committee, reversing such judgment, that the information was good, as the alleged contempt of the Legislative Assembly was charged only as a matter of aggravation, and could be rejected as surplusage, and the information sustainable for an assault. The Attorney-General of New South Wales *v.* Macpherson - 268

2. —— In a cause of damage in the Admiralty Court, alleged to have been done by, and imputable to the acts of the Owners, and their Servants, of the Vessel proceeded against, a general denial was pleaded in answer, and a special defence that the damage complained of was the same as had already been adjudicated upon in a Court of Law, and judgment obtained and satisfied; at the hearing in the Admiralty Court, it was proved by a Witness, who was the principal Defendant in the action at law, that the damage proceeded for was occasioned by acts done by him on his own responsibility, and in the assertion of a right claimed by him as Consignee for sale of the Vessel in question, and not as the Agent on behalf of the Owners: whereupon the Judge of the Court of Admiralty held, that the suit could not be maintained; but, inasmuch as the defence thus disclosed had not been specifically pleaded, declined to give the Defendants their costs, or to go into the special defence, though his judgment thereon was asked for by the Defendants' Counsel:—*Held*, by the Judicial Committee, that in the circumstances, the appeal was not for costs alone within the meaning of the rule of the appellate Court against the allowance of appeals involving costs only; that the general traverse and denial of the averments in the Petition, was sufficient to justify the evidence produced; and that the Defendants were further entitled to have the judgment of the Court, as asked on the special defence pleaded, that if prejudiced by such judgment, they might appeal. The "Orient" - - - - 695

PLEDGE.] Advances made on goods detained in the Custom House for duties, storage, &c. Young *v.* Lambert - - - - - 142

PRACTICE.]—1. Special leave to appeal having been given on an *ex parte* application, and upon an erroneous statement contained in the Petition

PRACTICE—*continued.*

for leave: the Order allowing such leave discharged with costs. Bulkeley *v.* Schutz 196

2. —— Before the Judicial Committee will entertain an application for extension of the term of Letters Patent the accounts of the profits of the Patent must be shewn to be clear, and admit of no doubt, and the *onus* lies on the Petitioner to establish that fact. *In re* Saxby's Patent 292

3. —— *Semble*, it is not competent for parties in a suit for partition to propose at the hearing of the appeal a fresh reference to experts for the purpose of suggesting another scheme for the division of the property in litigation. Bugeja *v.* Camilleri - - - - - 258

4. —— On a petition for special leave to appeal the petition must fully and truly state all circumstances which possibly can have any bearing on the leave asked for.—Where, on the evidence submitted to the Court below, the Order was properly made, no appeal will lie on the ground that facts existed which would, if known to that Court, have led to a different Order being made, those facts not having been submitted to the Court. Lyall *v.* Jardine - - - 318

5. —— Suit retained by Appellate Court. Voysey *v.* Noble - - - - 357

6. —— The principles laid down in *The Julia* (14 Moore's P. C. Cases, 210), which uniformly guide the appellate Court upon questions of fact, adopted. The "Esk" and The "Niord" 436

7. —— Special leave to appeal allowed from an Order of the High Court of Judicature for the *North-Western Provinces of India*, by which Order an infant Daughter was taken from the custody of her Mother, a Mahomedan, on the ground, that the Minor's deceased Father had been a professed Christian, and her Mother, who was, as the Court held, living in adultery, was inducing her Daughter to adopt the faith and habits of a Mahomedan. *In re* Skinner - - 451

8. ——. Special leave to appeal (the sum involved being below the appealable amount) allowed, on the ground that the question involved the construction of a Colonial Act which affected the interests of a large class in the Colony for which the Act was passed.—In granting the special leave the Judicial Committee limited the appeal to the construction of the Colonial Act. Brown *v.* McLaughan - - - 458

9. ——. Leave to appeal had been granted by the Court below from the Order refusing interest: but the Appellant petitioned the Queen in Council praying that the Judicial Committee might determine the matter as related to the claim for interest:—*Held*, that, if the original Order did not impliedly give interest, and as an appeal had been granted from the Order refusing it, the more convenient course would be to bring the question before the Judicial Committee on the original appeal. This was agreed to, and the case directed to be argued, without printed Cases, on the materials furnished by the Record of the proceedings on the application to the Court below to carry out the Order in Council. Rodger *v.* The Comptoir d'Escompte de Paris - - - 465

10. ——. As a general rule the appellate Court will not reverse a decision of the Court below on a mere question of fact; but where there is no conflict of testimony, and the only question of fact is as to the effect of the facts proved in raising further inferences of fact, that rule does not apply. Thurburn *v.* Steward - - 478

11. ——. Special leave to appeal granted on the ground, that the question raised was one of public interest, involving the constitutional rights of a Colonial Legislative Assembly. On reversing of the Order of the Court below no costs were given, as the appeal was only allowed to decide the abstract question. The Speaker of the Legislative Assembly of Victoria *v.* Glass - 560

PREFERENTIAL LIEN: *See* Colonial Law. 12.

PRESCRIPTION: *See* Colonial Law. 3.

PRESENTMENT OF BILL OF EXCHANGE: *See* Bill of Exchange.

PRESENTMENT OF PROMISSORY NOTE.] What time held reasonable with reference to the circumstances of the case. The Chartered Mercantile Bank of India *v.* Dickson - 574

PRINCIPAL AND AGENT.] Authority given by two Directors of a Joint Stock Company to draw on Company's Bankers held *ultrà vires*. Cherry *v.* The Colonial Bank of Australasia - 24

PRINTED CASES, in circumstances, dispensed with. Rodger *v.* The Comptoir d'Escompte de Paris - - - - - 465

PRIORITY OF CREDITORS: *See* Colonial Law. 11.

PRIVILEGES OF THE LEGISLATIVE HOUSE OF ASSEMBLY OF VICTORIA: *See* Colonial Legislative House of Assembly.

PROMISSORY NOTE.] The law with regard to time for the presentation of a Promissory note, payable on demand, requires that the presentation for payment be made within a reasonable time—that is, a period reasonable with reference to the circumstances connected with each particular case.—Where, therefore, a Promissory note, dated the 16th of February, 1864, and indorsed, though made payable on demand, but the payment of which was not contemplated by the Makers at any immediate or specific date, was not presented to the Payee for payment until the 14th of December in the same year; it was *held* by the Judicial Committee (overruling the judgment of both the Inferior and Superior Courts below), that it appearing from the evidence, that the Note was meant to be, to a greater or less extent, a continuing security, the delay in presentation was, in the circumstances of the case, not unreasonable, and the holders of the Note were entitled to recover thereon. The Chartered Mercantile Bank of India *v.* Dickson - - - 574

PROFITS: *See* Patent. 2, 3, 4.

PROLONGATION OF TERM OF LETTERS PATENT: *See* Patent.

PUBLIC SALE: *See* Sale.

QUESTION OF FACT ONLY—RULE OF THE APPELLATE COURT: *See* Practice. 2, 10.

REASONABLE TIME FOR PRESENTMENT OF BILL OF EXCHANGE OR PROMISSORY NOTE: *See* Bill of Exchange; Promissory Note.

RECONVENTION: *See* Colonial Law. 11.

REPAYMENT OF AMOUNT OF JUDGMENT PAID WHEN REVERSED ON APPEAL, WITH INTEREST. Rodger *v.* The Comptoir d'Escompte de Paris - 465

REFERENCE BY THE CROWN TO THE JUDICIAL COMMITTEE. Hebbert *v.* Purchas - - - - - 664

REGISTRATION: *See* Colonial Law. 11.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA: *See* Ship and Shipping.

REHEARING.] Petition to Her Majesty in Council for rehearing of an appeal refused. Hebbert *v.* Purchas - - - - - 664

REMUNERATION FOR SALVAGE SERVICES. *Quantum* increased by Salvors for saving life, ship, and cargo. The "Glenduror" - - 589

RESTITUTION: *See* Interest.

REVENUE: *See* Colonial Law. 10.

REVERSAL OF JUDGMENT: *See* Interest.

ROMAN-DUTCH LAW: *See* Colonial Law. 3, 11, 13.

RUBRICS IN PRAYER BOOK, CONSTRUCTION OF: *See* Ecclesiastical Law.

SALE.] There is no authority to be derived from principle or precedent, for a ship sold by public auction to a *bonâ fide* innocent purchaser, before any proceedings have been taken on the part of the Crown against the Ship, being afterwards arrested and condemned on account of having been engaged previously in piratical acts. The "Telegrafo" - - - - - 673

SALVAGE.]—1. Salvage services of a highly meritorious character having been performed by Salvors, in saving the lives of the Crew, and the Ship and cargo, valued at £46,000, the Admiralty Court awarded £1,000 as salvage for such services. On appeal, *held*, that the sum was insufficient, and the remuneration increased to £2,000, in consideration (1) of the great danger the Salvors incurred; and (2) the fact of the saving of lives, and the value of the Ship and cargo. The "Glenduror" 589

2. —— Where salvage services are performed by one Ship to another, both Ships belonging to the same Owners, the Master and Crew of the Ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the Owners, and for which they would be paid for by their ordinary wages. The "Sappho" - - 690

SEAWORTHINESS.] A Policy on a Steam Vessel was effected in *Lower Canada* at and from *Montreal* to *Halifax*, in *Nova Scotia*. The Policy especially excepted the Underwriters, *inter alia*, from "rottenness, inherent defects, and other unseaworthiness; theft, barratry, or robbery; bursting or explosion of Boilers; or collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external cause, or fire ensue therefrom; and charges, damages, or loss in consequence of a seizure or detention on account of any illicit or prohibited trade in articles contraband of war." At the time of starting there was a defect in the Boiler of the Vessel, which was not apparent in rivers, but when she got into salt water she became disabled by reason of such defect, and was compelled to put into port to repair, when, after being repaired and detained for some days, she proceeded to sea, but encountering bad weather was lost;—*Held*, first, that in a Voyage Policy there is, by implication of law, a warranty of seaworthiness, which had not been complied with, as the Vessel sailed with a defect of such a nature that, so long as it remained unremedied, it made her unseaworthy for the voyage, or stage of the voyage, she entered upon, and that although the defect was afterwards repaired, though before loss, it avoided the Policy:—Secondly, that the enumeration of excepted losses contained in the Policy, from "loss from unseaworthiness," did not exclude the implied warranty of seaworthiness, as it did not expressly specify an intention to exclude it.—There may be different stages of seaworthiness in cases where the different stages of navigation involve the necessity of a different equipment or state of seaworthiness; but the Vessel must be properly equipped, and in all respects seaworthy, for each of the stages respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with. The Quebec Marine Insurance Company *v.* The Commercial Bank of Canada - - - - 234

SECURITY FOR LOAN BY BANKING COMPANY ON NEXT CLIP OF WOOL: *See* Colonial Law. 12.

SERVITUDE BY PRESCRIPTION: *See* Colonial Law. 3.

SET-OFF: *See* Colonial Law. 1.

SHIP AND SHIPPING.] 1. Construction of Articles 13. 14, and 18, of the Steering and Sailing Rules of the *Merchant Shipping Acts Amendment Act* of 1862 (25 & 26 Vict. c. 63).—In inferring the intended movements of a Vessel approaching from a contrary direction, the relative position of the two Vessels when they first come in sight of each other must not alone be regarded; other circumstances, such as the bend of the River, or the necessity of avoiding another Vessel, which may occasion the apparent alteration of course, must be considered.—By the *Merchant Shipping Acts Amendment Act* of 1862, Vessels navigating narrow channels are at liberty to go on whichever side they please, taking care to observe the Regulations for preventing collision.—A Steam-vessel coming up the River *Thames* came in sight of another Steam-vessel proceeding down the River at the time she was rounding a bend of the River, and for that purpose had placed her head in such a direction that, unless her course was changed, the Steamers would, if the former kept her course, cross each other so as to involve risk of collision; whereupon the Steamer coming up the River, having the other on her starboard side, changed her course so as to keep out of the way, if the other Steamer followed the direction in which her head was turned; the latter not doing so, but pursuing her intention of rounding the bend of the River, the two Steamers came in collision. A suit having been instituted against the Steamer rounding the bending of the River, the Judge of the Admiralty Court held, that the Plaintiffs'

SHIP AND SHIPPING—*continued.*

Steamer had only done what was required of her under the 14th Article of the Regulations for preventing collisions, which directs, that "if two Ships under steam are crossing, so as to involve risk of collision, the Ship which has the other on her own starboard side shall keep out of the way of the other:"—On appeal, *held*, by the Judicial Committee, that the decree was wrong, that the 14th Article did not, in the circumstances, apply, and that the Plaintiffs' Steamer was, therefore, not justified by it: that the Steamer sued was acting in conformity with the 18th Article, which directs, that where by the Steering and Sailing Rules "one of two Ships is to keep out of the way, the other shall keep her course:" and that the Steamer sued was not in any way to blame. The "Velocity." - - - 44

2. —— In a case of collision between a Steamship and Sailing Vessel, occasioned by the fault of the Steamship, it was proved, that the Sailing Vessel had failed to comply with the Admiralty Regulations regarding lights, having either shewn no lights, as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention.—The Judicial Committee reversed the decision of the Admiralty Court, being of opinion, that the collision might have been avoided if the Sailing Vessel had obeyed the Admiralty Regulations, and that though the omission to exhibit proper lights might be immaterial where it is clearly shewn that the absence of such lights was not the cause of the collision, and did not conduce to it, yet that where it is proved, that a Vessel has not shewn proper lights the *onus* lies on such Vessel to shew, that the non-compliance with the Regulation was not the cause of the collision, which the Sailing Vessel failed to do; the general rule being, that a Vessel must not only obey the Admiralty Regulations as regards lights, but must obey them in time to prevent an impending collision. The "Fenham." [212

3. —— Collision between two Steamships, the *Niord* and the *Esk*, whilst rounding a point on the Kentish side of the River *Thames* which divides the reach called the *Half-way Reach* from the *Barking Reach*. The *Niord* coming up, and seeing the *Esk* rounding the point, having put her helm hard-a-port, in order to cross the river, the *Esk* stopped, and reversed her engines, and put her helm a-starboard, the result causing a collision; the *Esk* running almost at right angles into the *Niord*, nearly at her midships, cutting clean into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore:—*Held*, that, without determining whether these Vessels were crossing Vessels within the meaning of the 14th Article of the Steering and Sailing Rules, that the *Esk* was solely to blame, and the decree of the Admiralty Court, in that respect, affirmed.—The construction put on the 14th Article in the case of *The Velocity* (Law Rep. 3 P. C. 44) explained and limited. The "Esk" and The "Niord" - - - 436

SOUTH AUSTRALIAN LAW: *See* Colonial Law. 2, 6, 12.

SPECIAL LEAVE TO APPEAL: *See* Practice. 1, 4, 7, 8, 11.

STAGES IN VOYAGE, EFFECT ON POLICY, AS TO SEAWORTHINESS: *See* Seaworthiness.

STATUS: *See* Will.

STATUTE OF LIMITATIONS: *See* Limitation. 2.

STEERAGE AND SAILING RULES: *See* Ship and Shipping. 1, 3.

STOWAGE: *See* Damage to Cargo.

SUCCESSION OF CO-HEIRS BY THE LAW OF MALTA.] Bugeja *v.* Camilleri 258

SURPLICE: *See* Ecclesiastical Law. 6.

SURPLUSAGE: *See* Pleading. 1.

SUSPENSION OF CLERK IN HOLY ORDERS; *See* Ecclesiastical Law. 3.

TENANT AT WILL: *See* Limitation. 2.

TESTAMENTARY POWER by the law of *Jersey* of Testator to dispose of moveables is limited to one-third. La Cloche *v.* La Cloche - - 125

TITHE IMPROPRIATOR, liability for repairs of Church, including the Chancel. Smallbones *v.* Edney - - - - - - 444

TOTAL LOSS: *See* Insurance (Marine).

TOWAGE: *See* Compulsory Pilotage.

TROVER: *See* Colonial Law. 12.

TRUST: *See* Bailment; Colonial Church.

TUNICLE: *See* Ecclesiastical Law. 6.

ULTRÀ VIRES—Clause in Banking Charter prohibiting the taking of certain securities for loan: *See* Colonial Law. 6.

UNDUE PREFERENCE: *See* Colonial Law. 11; Insolvency.

VENIRE DE NOVO—On appeal, conviction quashed and new trial granted. Levinger *v.* Reg. 282

VESTMENTS: *See* Ecclesiastical Law. 6.

VICTORIA COMMON LAW PROCEDURE ACT: *See* Colonial Law. 2.

VICTORIA LEGISLATIVE HOUSE OF ASSEMBLY, constituted by Statute, 18 & 19 Vict. c. 55, and *Colonial Act*, No. 1, power of, to commit for breach of privileges. The Speaker of the Legislative Assembly of Victoria *v.* Glass - - 560

VICTORIA JURIES ACT, No. 272 of 1865, s. 37, Construction of: *See* Peremptory Challenge.

VOYAGE POLICY—Special exemptions from Loss: *See* Seaworthiness.

WAFER BREAD: *See* Ecclesiastical Law. 6.

WARRANT, in general terms, by the Speaker of the House of Assembly of *Victoria*:—*Held*, good. The Speaker of the Legislative Assembly of Victoria *v.* Glass - - - - 560

WATER MIXED WITH WINE: *See* Ecclesiastical Law. 6.

WATER RIGHTS: *See* Colonial Law. 3.

WILL—*S.*, a Military Officer in the *East India Company's* service, died in 1841, domiciled in *Delhi*, in the *North-Western Provinces of India*. At the time of his death there was no *lex loci* in

WILL—*continued.*

those Provinces, and the law applicable to the succession depended on the personal *status*, which was regulated by the religion of the individual: and in the event of such rule not being applicable, the Courts were, as provided by the Regulations, to determine according to the rules of justice, equity, and good conscience. There was no evidence that *S.* professed any particular religion. *S.* had five illegitimate Sons acknowledged by him in his lifetime, and several Grandchildren, all of whom were, with one exception, illegitimate. By his Will, made in the English form, after giving life estates to his five Sons, he bequeathed as follows;—"I will and declare, that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons (naming them) dying leaving issue or children that the share of the Fathers shall devolve on the issue or children, to be by them divided in equal shares." *J.*, an illegitimate Son of one of the Testator's five Sons, born some years after the Testator's death, claimed, under the above devise to "children," to share with his legitimate Sister a moiety of his Father's one-fifth share:—*Held* (reversing the decree of the Courts in *India*), first, that the technical rule of English law, that under a testamentary gift to children as a class, illegitimate children, although recognised by the Testator in his lifetime, cannot share with natural lawful children, was not applicable, and that, under the circumstances, it was impossible to apply any particular law of construction to *S.'s* Will, or to regulate his succession, and that, therefore, the case fell to be decided, as directed by the Regulations, by the principles of natural justice, equity, and good conscience; and—Secondly, that the limited signification which the English law puts upon the word "children" when used as the designation of a class, and not as *descriptio personæ*, was not to be followed in construing *S.'s* Will, as the word "children" in such Will denoted and included as well illegitimate as legitimate children, and such illegitimate children having been recognised and treated by *S.* as his children, effect was to be given to the devise, according to the actual meaning in which the Testator used the word "children," whereby he intended to include illegitimate children of his Sons whenever acknowledged by their putative Father, and that the illegitimate child of *J.* took equally with his legitimate Sister under *S.'s* Will. Barlow *v.* Orde - - - - 164

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